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In the Supreme Court of the United States

October Term, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, and CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, and CARL ZWERNER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether consistent with the federalism and due process that are enforced through the Fourteenth Amendment, a California court can exercise jurisdiction in a class action over absent, nonresident class members and their claims or defenses thereto when (1) the class members are nonresidents who have no contacts with California; (2) the class members have not affirmatively consented to California's jurisdiction; and (3) California has no significant interest in the claims, which arose entirely in other states?

2. Whether consistent with the due process clause of the Fourteenth Amendment and the full faith and credit clause of Article IV of the Constitution, California can apply its own law in a multistate class action to transactions among nonresidents having no connection with California?

3. Whether consistent with the due process clause of the Fourteenth Amendment, a California court can enter an *in personam* class judgment, in a class action premised upon a common question of law or fact, without prior notice to absent class members and without affording them any opportunity to opt out of class-action prosecution of the claim upon which the judgment is entered?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, AND CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, AND CARL ZWERNER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

Petitioners Jack Grynberg, Jack Grynberg and Associates, and Celeste Grynberg pray that a writ of certiorari issue to review an opinion and judgment of the California Court of Appeal, First Appellate District, affirming an order and judgment of the Superior Court of Alameda County, California.

OPINIONS BELOW

The opinion and judgment of the California Court of Appeal are published at 161 Cal.App.3d 1128, 208 Cal.Rptr. 336 and are set forth at page A2 of the Appendix. The unpublished order of the Superior Court of Alameda County, California, with pertinent exhibits, is set forth at page A19 of the Appendix.

JURISDICTION

The California Court of Appeal entered its opinion and judgment on November 21, 1984 and denied a rehearing on December 19, 1984. This Petition is filed within 90 days of

February 14, 1985, when the California Supreme Court denied a timely petition for hearing (*Appendix*, p. A1). This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law * * *.

Article IV, Section 1 of the United States Constitution provides, in pertinent part:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

The pertinent statutory provision is California Code of Civil Procedure Section 382, which provides:

> If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.[1]

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1. The Supreme Court of California has repeatedly directed the California courts to utilize Federal Rule of Civil Procedure 23 in determining questions of the procedure for and the propriety of class certification. *City of San Jose* v. *Superior Court of Santa Clara County*, 12 Cal.3d 447, 453-54, 115 Cal.Rptr. 797, 801, 525 P.2d 701 (1974); *Vasquez* v. *Superior Court of San Joaquin County*, 4 Cal.3d 800, 821, 94 Cal.Rptr. 796, 809, 484 P.2d 964 (1971); *Daar* v. *Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 734, 433 P.2d 732 (1967).

STATEMENT OF THE CASE

Petitioners Jack Grynberg and Celeste Grynberg (collectively the "Grynbergs"), husband and wife, are Colorado residents having their principal places of business in Denver.[2] In 1972, Jack Grynberg, as general partner, offered limited partnership interests in a Colorado limited partnership, the Greater Green River Basin Drilling Program 72-73 ("GGRB"), pursuant to a registration statement which became effective on September 19, 1972, under Section 8 of the Securities Act of 1933, 15 U.S.C. § 77h. GGRB was an oil and gas drilling program, structured and marketed as a tax shelter. Fifty-eight individuals (directly or indirectly through entities), residing in 13 states, purchased GGRB interests in 1972 for prices aggregating $4,000,000. The purchasers were wealthy, tax-conscious and sophisticated; each contributed from $25,000 to $350,000; 16 (approximately 27%) were California residents who contributed approximately 22% of the initial GGRB capital.

GGRB explored for oil and gas in Colorado, Wyoming, and Utah in 1973 and 1974, with Jack Grynberg conducting all its business and operations from Denver. In 1974, Jack Grynberg proposed and the limited partners approved an amendment to the GGRB partnership agreement in order to finance additional drilling. Some of the limited partners contributed an additional $550,000 to GGRB's capital pursuant to the amendment; most made no additional contribution.

In March 1975, five limited partners, including only one California resident, commenced an action (the "*Danzig* action") against the Grynbergs in Alameda County Superior Court in Oakland.[3] Individually and as putative representa-

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2. "Jack Grynberg and Associates" was a tradename of Petitioner Jack Grynberg at all times pertinent, is not a person or entity independent of Jack Grynberg, and accordingly is not referred to separately.

3. One named plaintiff, a resident of Minnesota, died shortly after commencement of the action. The named plaintiffs also included two Florida residents and one Colorado resident.

tives of the other limited partners, the plaintiffs alleged that the additional capital contributions which had been made pursuant to the 1974 amendment of the GGRB partnership agreement had been obtained by fraud and in violation of the partnership agreement. On behalf of the limited partners who had made the additional capital contributions, the named plaintiffs sought a judgment declaring the rights and duties of the parties, rescission of the 1974 amendment and restitution of $550,000. On behalf of all the limited partners, the named plaintiffs sought a judgment declaring that certain oil and gas leases were assets of GGRB, an accounting and other relief enforcing the GGRB partnership agreement and fiduciary duties of Jack Grynberg as GGRB's general partner.

In February 1976, the Alameda County Superior Court certified the named plaintiffs' claims for class treatment. The 1976 class notice (*Appendix*, p. A47) divided the claims into (1) claims seeking rescission of the 1974 amendment to the GGRB partnership agreement and restitution of the additional capital contributions;[4] and (2) claims for breach of the GGRB partnership agreement, an accounting and alleged breaches of fiduciary duty.[5]

Four and one-half years after commencing the *Danzig* action, the named plaintiffs obtained leave in November 1979 to amend their complaint and to assert a further claim (the "1979 Rescission Claim"). For the first time, they requested rescission of the GGRB partnership agreement *ab initio* and restitution of *all* original capital contributions. The named plaintiffs, however, did not request or obtain class certification or recertification of the 1979 Rescission Claim. Prior to entry of the trial court's judgment, no class member received

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4. These claims were equivalent to Federal Rule of Civil Procedure 23(b)(3) claims; class members who had made additional contributions were given an opportunity to opt out of class prosecution of those claims.

5. These claims were equivalent to Federal Rule of Civil Procedure 23(b)(1) and (b)(2) claims, and no class member was given an opportunity to opt out.

notice of class-action prosecution of that claim. None was accorded an opportunity to opt out.

Trial without a jury occurred at intervals in February, March and April, 1980. The Alameda County Superior Court originally entered a class judgment upon the 1979 Rescission Claim in December 1980 and, on February 4, 1981, entered a modification of the judgment *nunc pro tunc* as of December 22, 1980. *Appendix*, p. A43.

The trial court found that the Grynbergs had fraudulently induced the initial purchase of all GGRB partnership interests, rescinded both the 1972 agreement and its 1974 amendment, awarded $6,311,912.86 in rescissory damages and interest against the Grynbergs jointly, and $431,081.06 in punitive damages against Jack Grynberg. *Appendix*, p. A37; 44-5. The trial court's judgment permitted class-action treatment of the 1979 Rescission Claim. *Appendix*, p. A36.[6]

In connection with their appeal from the judgment to the California Court of Appeal, First Appellate District, the Grynbergs filed a motion with the Court of Appeal alleging

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6. Prior to entry of its original judgment, the trial court issued a "Notice of Intended Decision." Pursuant to California Code of Civil Procedure Section 634, the Grynbergs required the named plaintiffs to prepare proposed findings based on the intended decision to which the Grynbergs could object. Under Section 232(a) of the California Rules of Court, the Notice of Intended Decision is not a judgment. The original *Danzig* judgment was not entered until after the trial court had considered the plaintiffs' proposed findings and conclusions and the Grynbergs' objections thereto.

Prior to the entry of the modification of the original judgment, the Grynbergs raised, by motions for new trial, objections to findings and conclusions, objections to the intended decision, or otherwise, numerous objections including the following: (1) the unfairness to the Grynbergs of *ex post facto* application of California law to all claims of absent non-California residents and the invasion of rights of other states resulting therefrom; (2) the absence of any independent class certification of the 1979 Rescission Claim prior to judgment and the lack of class notice of that claim to absent class members; and (3) the denial of due process and the absence of jurisdiction over the subject matter on the basis that the *Danzig* action was not a proper class action.

California's lack of jurisdiction over and the nonapplicability of California law to claims of nonresident, absent class members with whom California had no contacts or relationship. The Grynbergs' motion sought dismissal of the trial court's judgment to the extent that it had been entered in favor of the absent nonresidents. On appeal, the Grynbergs also asserted that the 1979 Rescission Claim was not certified for class treatment prior to the class judgment; the absent class members were given neither notice nor an opportunity to opt out of class treatment of that claim; and the class judgment consequently deprived the Grynbergs of due process in violation of the Fourteenth Amendment.

On June 24, 1983, the Court of Appeal denied the Grynbergs' motion for partial dismissal "without prejudice to the review of the issues of jurisdiction, choice of law and class certification upon review of the appeal on its merits." *Appendix*, p. A18. In later deciding the appeal on its merits, the Court of Appeal did not address the Grynberg's due process objections, other than by stating that the failure to provide class notice of the 1979 Rescission Claim "was clearly harmless" because the class had received "adequate notice of the original complaint alleging the ultimate factual averments underlying the rescission theory of relief."[7]

On February 14, 1985, the Supreme Court of California, without opinion, denied the Grynbergs' petition for hearing. *Appendix*, p. A1.

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7. *Appendix*, p. A8, n. 5. The Court of Appeal's conclusion that the class had received notice of ultimate facts justifying rescission of the GGRB partnership *ab initio* is not supported by terms of the class notice. *See Appendix*, p. A47.

REASONS FOR GRANTING THE WRIT

I. The *Danzig* Decision Presents Essentially the Same Important, Fundamental Constitutional Questions Which Prompted this Court to Grant Certiorari in *Phillips Petroleum Co. v. Shutts.*

A. Summary.

Thirty-nine of the 54 purchasers who ultimately became absent class members were residents of 12 states other than California.[8] The record is devoid of any evidence that these nonresidents or their claims had any contacts with or relationship to California.

Interests in GGRB were offered and GGRB operated from Colorado (the Grynbergs' state of residence). *Appendix*, pp. A3; 20-1. The written materials containing the representations that the trial court found to be fraudulent were mailed from Colorado to the states of residence of the non-California class members. All of GGRB's exploration, drilling and other business operations occurred in Colorado, Utah, and Wyoming. *Appendix*, p. A3. Any individual claims of absent non-California class members against the Grynbergs arose exclusively from transactions, events, and conduct outside California. California has absolutely no interest in the claims of the nonresident class members, and the sole contact among California and these claims is the named plaintiffs' fortuitous selection of California as a forum for their class action.

Many of the same fundamental questions of interstate federalism, due process, and full faith and credit that are *sub judice* in *Phillips Petroleum Co.* v. *Shutts*, No. 84-233, are

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8. The table at *Appendix*, p. A53 shows the state of residence, distribution of investors, and amounts invested. Because of assignments, changes of residence, other intervening events and awards of damages to entities comprised of several individual purchasers, the class judgment was entered in favor of 55 absent class members, 16 of whom then were California residents. *See Appendix*, pp. A41-2.

raised in *Danzig* and require this Court's review. In *Shutts*, the Kansas Supreme Court asserted jurisdiction over claims of a nationwide class of oil and gas royalty owners notwithstanding the lack of any nexus among the nonresidents, their claims, and Kansas. The California Court of Appeal's assertion of jurisdiction in *Danzig* similarly lacks any nexus among nonresidents, their claims, and California.

Danzig should be reviewed because (1) this Court has not previously adjudicated the precise issues presented; (2) the holding below contravenes this Court's long-standing precedents on the limits of state-court jurisdiction under the Fourteenth Amendment and the principles of interstate federalism implemented thereby; (3) California's decision in *Danzig* is one of several conflicting state-court decisions of the constitutional questions presented; (4) the jurisdictional power of individual states to adjudicate multistate class actions should be governed by a uniform rule and controlling precedent that are consistent with paramount federal due process limitations; and (5) the federal constitutional limitations upon the application of forum state law in a class-action context to transactions with which the forum has no contacts should be clarified.

This Court should review *Danzig* for an additional important reason. The Kansas Supreme Court relied upon notice to absent class members and other elements of what it considered procedural due process, instead of upon minimum contacts, as its jurisdictional touchstone. *See Shutts* v. *Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159, 1170-71 (1984), *cert. granted Phillips Petroleum Co.* v. *Shutts*, ___ U.S. ___, 105 S.Ct. 242, 83 L.Ed.2d 181 (1984). In sharp contrast to *Shutts*, the absent class members in *Danzig* never received notice of the 1979 Rescission Claim prior to entry of the *Danzig* judgment; neither were they accorded any opportunity to opt out of class prosecution of that claim.

B. California's Assertion of Jurisdiction Over Claims by Nonappearing, Nonresident Class Members With Whom California Has No Contacts Violates the Due Process Clause.

The interstate federalism effectuated by the Constitution requires that each state accord respect to the sovereignty of the other states in the Union. Notwithstanding considerations of fairness, convenience, or the forum state's interest in a controversy, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980). The exercise of state judicial power must be predicated upon "minimum contacts" among the forum state and the parties in order to ensure both fairness and the "orderly administration of the laws." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). In *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977), this Court declared that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe*."

These standards enforce fundamental "territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958). The minimum contacts requirement "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 292, 294 (1980). Adjudicating and extinguishing or enforcing claims of unnamed class members who have no contacts with the forum state and who have not affirmatively consented to its jurisdiction contravene the "minimum contacts" requirement. Certiorari should be granted to make clear that this Court's holdings limit state judicial power in multistate class actions just as in individual lawsuits.

Both in *Danzig* and *Shutts*, most of the plaintiff class consists of nonappearing nonresidents. *See Shutts* v. *Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d at 1166. In each case,

the defendant asserts that, absent any contacts — let alone minimum contacts — the forum may not adjudicate claims or rights of absent class members. *Id.*, 679 P.2d at 1167. In each case, a state court entered a class judgment in favor of absent class members with whom the forum state had no contacts or other affiliations and whose claims lacked any nexus with the forum.

Absent contacts with the forum state, constitutional "territorial limitations on the power of the respective States," *see Hanson* v. *Denckla*, 357 U.S. at 251, should not be erased when a state focuses its jurisdictional power on a plaintiff and his claims rather than on a defendant and his defenses.[9] Such constitutional limitations compel a recognition that a plaintiff's cause of action "is property and is protected from arbitrary interference. . . . " *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933). "Property" is protected by the due process clause of the Fourteenth Amendment without reference to its ownership by a "plaintiff" or a "defendant." A class-action defendant's recognition of property rights of a plaintiff is compelled in a class action, not by a tender sympathy for plaintiffs, but by the prospect of future litigation with absent, nonappearing class members who attack the constitutionality of a class judgment, if unfavorable to the class.

Fundamental constitutional demarcations should not depend on an artificial, often fortuitous, classification of the litigants dictated solely by who commences the action or first raises the jurisdictional issue. A defendant's assertion of a counterclaim, which may be mandatory under a forum state's

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9. This case is distinguishable from *Keeton* v. *Hustler Magazine, Inc.*, ___ U.S. ___, 104 S.Ct. 1473, 79 L.Ed.2d 290 (1984), in which this Court permitted a nonresident plaintiff with no previous contact with the forum to sue a nonresident and stated that "minimum contacts" previously had not been required when the plaintiff suffered damage in the forum state from intentional acts of defendants which caused foreseeable damage in that state. No nonresident, nonappearing class member in *Danzig* either suffered injury in California, intentional or otherwise, or voluntarily chose California as a forum. *Cf. Calder* v. *Jones*, ___ U.S. ___, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

rules of procedure, turns the plaintiff into a defendant for that purpose; a realignment of parties similarly recognizes the reality of litigation posture and status.[10]

If the Grynbergs had commenced a California action against all the *Danzig* limited partners individually in order to obtain a judgment (as originally sought in *Danzig*) declaring the partners' respective rights and obligations under the GGRB partnership agreement, a California judgment would have no binding effect on nonresident limited partners and would not be entitled to full faith and credit in the absence of minimum contacts among California and the nonresidents. *See Hanson* v. *Denckla*, 357 U.S. at 246-53. The unilateral activity of the Grynbergs would not, in that event, satisfy the constitutional requirement that California have minimum contacts with the nonresidents or justify California's assertion of jurisdiction over the nonresidents. *See Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, ___ U.S. ___, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984). The addition of class allegations to such a complaint should not confer jurisdiction which otherwise would be absent. *Cf. Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

The California decision in *Danzig*, the *Shutts* decision, and the Illinois decision in *Miner* v. *Gillette Co.*, 87 Ill.2d 7, 56 Ill. Dec. 886, 428 N.E.2d 478 (1981) *cert. granted, Gillette Co.* v. *Miner*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982) — all of which reject the application of this Court's precedents regarding minimum contacts to absent class members in multistate class actions — conflict with the decisions of the Pennsylvania Supreme Court in *Klemow* v. *Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976), and the New Jersey Appeals Court in *Feldman* v. *Bates Mfg. Co.*, 143 N.J.Super. 84, 362 A.2d 1177 (App.Div. 1976) — both of which require jurisdictional contacts between absent class

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10. California Code of Civil Procedure Section 382, the California class action statute, provides that "[i]f the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant. . . . "

members and the forum state.[11] These disparate decisions intensify conflicts among the states, eliminate predictability as to governing law, and promote high-stakes forum shopping. Under the *Klemow* and *Feldman* decisions, the presently 13 Pennsylvania and New Jersey absent members of the *Danzig* class have a judgment that they could not have obtained in their home states and that may not be entitled to full faith and credit in any state except California, Kansas, and Illinois. Until these conflicts are resolved, jurisdictional integrity of state class-action judgments is highly questionable; and the uniform, orderly administration of laws is impaired accordingly.

If decisions like those reached by the supreme courts of Kansas, Illinois, and California are not declared constitutionally impermissible, any state is free to open its courts as class-action havens, like divorce mills of another era, to disputes in which it has no interest in order to attempt to impose its local or regional policies nationally.[12] Such policies may conflict

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11. *See also Geller* v. *Tabas*, 462 A.2d 1078 (Del. 1983) and *Schlosser* v. *Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978), which, without extensive analysis, appear to allow jurisdiction over absent plaintiffs if the action has a nexus with the forum; *Katz* v. *NVF Company*, 119 Misc.2d 48, 462 N.Y.S.2d 975 (Sup.Ct. 1983), *rev'd. on other grounds*, 100 App.Div.2d 470, 473 N.Y.S.2d 786 (1984), and *Brandon* v. *Chefetz*, 121 Misc.2d 54, 467 N.Y.S.2d 312 (Sup.Ct. 1983), *app. dismissed*, 106 App.Div. 162, 485 N.Y.S.2d 55 (1985), in which New York courts require an extensive, individualized analysis of contacts with the forum state, convenience of the forum, and the number of resident class members.

12. For example, the California courts below have set a standard for investor prudence that other states may find too lenient and that offerors of securities perforce may find too risky, especially with no assurance of protection against an unpredictable assertion of jurisdiction and application of law by whatever state may be chosen as a forum by a class-action plaintiff. The *Danzig* judgment is based upon language in a preliminary "red herring" prospectus that did not appear in the definitive offering documents, which were not found to be fraudulent. *Appendix*, p. A3-4. *See* SEC Rule 134, 17 C.F.R. 230.134; Loss, *Fundamentals of Securities Regulation*, (1983), pp. 113-114, 127 (preliminary prospectus is "subject to correction and change without notice" and is not "considered an offer to sell or a

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with and nullify another state's well-established standards on which its residents and others have relied, justifiably, in structuring their conduct. If a state court's jurisdiction is not limited by this Court's unbroken line of precedents since *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), neither defendants nor nonresident class members can have any assurance that their "conduct and connection with the forum state will not be such that [they] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 297.[13]

The class-action jurisdiction of state courts should be limited affirmatively by requiring that all class members, whether plaintiffs or defendants, have minimum contacts with the forum state or expressly consent to its jurisdiction. Only by enunciating national governing principles in this context can this Court prevent a state that has no discernible interest in the adjudication of nonresidents' claims or a nonresident's defenses, as in *Danzig*, from invading the sovereignty of other states.

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solicitation to buy"). Based upon plaintiffs' argument that the preliminary and definitive offering materials were lengthy and looked alike, the *Danzig* courts excused the carelessness of each sophisticated, named plaintiff, who testified that he was given the non-fraudulent definitive materials but did not read them despite his having signed a sworn subscription statement representing that his investment was based only on the unread, definitive materials. *See Appendix*, p. A10, n. 7. For a contrasting standard of justifiable reliance and diligence, *see Zobrist* v. *Coal-X, Inc.*, 708 F.2d 1511 (10th Cir. 1983).

13. For example, any possible claims of the three New York *Danzig* investors against the Grynbergs arose out of communications from Colorado offering securities in New York, investment decisions made in New York, and a subscription contract signed in New York. Factors like these caused this Court to reject a previous assertion of jurisdiction by California. *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978).

C. The California Courts' Application of California Law to Nonresidents and to Transactions With Which California Has No Nexus Violates the Due Process and Full Faith and Credit Clauses.

Predictability of state law applicable to commercial transactions is severely undermined by the California courts' blanket application of California law in *Danzig* to nonresidents and to claims and defenses with which California "has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 308-11 (1981). A wholesale application of California law to such nonresidents and transactions foreign to California does not comport with the fundamental fairness that due process mandates.

In important respects, California's law differs from the laws of the twelve other states that have substantial interests in and contacts affiliating them with non-California *Danzig* class members, their claims and defenses thereto. Indiscriminate application of California law is especially egregious in multistate securities class actions. Each state has developed its own blue sky laws and policies regulating securities transactions in response to local needs and regulatory attitudes. Although 36 states have adopted some version of the Uniform Securities Act, a variety of state regulatory schemes and attitudes is still the rule, not the exception. Loss, *Fundamentals of Securities Regulation* at pp. 8-18. Indeed, California is well recognized for its "inhospitable climate for uniform legislation generally" and is particularly ill-suited for a role as national arbiter of securities fraud. *Id.* at p. 9.[14]

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14. *See also* Buchanan & Stevenson, *Developments in Litigation and Enforcement Under State Securities Laws*, 40 The Business Lawyer, 705, 706-713 (1985), which notes the wide disparity in state court rulings determining what is or is not a "security" to which state securities laws apply; and Sargent, *The Challenge to Merit Regulation*, 12 Sec.Reg.L.J. 276, 279 (1984), which describes the substantial disparity in the merit

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In addition, the standard of proof necessary to establish fraud in California is materially different from that in nine of the 12 other states in which non-resident absent *Danzig* class members resided.[15] The stringent standards of other states are nullified by California's application of its law.[16] Any Cali-

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review of securities offerings that California's restrictive attitude and labyrinthine regulations illustrate *par excellence*. *See* California Corporation Code, Section 25000 *et seq.*; California Administrative Code, Rule No. 250.3 *et seq.* and releases thereunder, *Blue Sky Law Rep.* [CCH] ¶¶12,502-752.

15. California requires proof of fraud by a "preponderance of the evidence." *Liodas* v. *Sahadi*, 19 Cal.3d 278, 137 Cal.Rptr. 635, 562 P.2d 316 (1977). Fully two-thirds of the other states which have contacts or affiliations with the subjects of *Danzig*, like Pennsylvania (the residence of 11 GGRB investors), for example, require proof of fraud by "clear, precise and convincing" evidence. *See, e.g., Carlson* v. *Sherwood*, 416 Pa. 286, 287, 206 A.2d 19, 20 (1965).

16. *See Peurifoy* v. *Congressional Motors, Inc.*, 254 Md. 501, 517, 255 A.2d 332, 340 (1969); *Galego* v. *Knudsen*, 282 Or. 155, 578 P.2d 769, 775 (1978) (presumption against fraud may be overcome only by "clear, satisfactory, and convincing" evidence); *Simcusky* v. *Saeli*, 44 N.Y.2d 442, 452, 406 N.Y.S.2d 259, 265, 377 N.E.2d 713 (1978) ("clear and convincing evidence"); *Creelman* v. *Rogowski*, 152 Conn. 382, 384, 207 A.2d 272 (1965) ("strictly proven by clear, precise and unequivocal evidence"); *Ray* v. *Winter*, 67 Ill.2d 296, 10 Ill.Dec. 225, 367 N.E.2d 678 (1977); *Carlson* v. *Sherwood*, 416 Pa. 286, 287, 206 A.2d 19, 20 (1965) ("clear, precise and convincing"), *but see First Pennsylvania Bank, N.A.* v. *Lehr*, 293 Pa.Super. 600, 438 A.2d 600 (1982) ("clear, direct, precise and believable"); *Ficor, Inc.* v. *McHugh*, 639 P.2d 385 (Colo. 1982); *Weise* v. *Red Owl Stores*, 286 Minn. 199, 175 N.W.2d 184 (1970); *Medivox Productions, Inc.* v. *Hoffman-LaRoche, Inc.*, 107 N.J.Super. 47, 256 A.2d 803, 814-15 (1969). In Florida, confusion over the accepted standard was not resolved until June 1984. *See Watson Realty Corp.* v. *Quinn*, 452 So.2d 568 (Fla. 1984). At the time of trial in *Danzig*, some Florida decisions adopted the stricter standard of proof. *See, e.g., Headley* v. *Pelham*, 366 So.2d 60 (Fla.App. 1978).

Federal courts, in denying multistate class-action certification of state common law fraud claims, have noted that the standards of common law fraud vary from state to state. *See, e.g., Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 883 (5th Cir. 1973); *Adise* v. *Mather*, 56 F.R.D. 492, 497 (D.Colo. 1972); *Lewis* v. *Capital Mortgage Investments*, 78 F.R.D. 295 (D.Md. 1977).

fornia interest, affiliating nexus or contacts with nonresidents being absent in *Danzig*, that nullification is arbitrary and unfair to the Grynbergs.

Other differences are also important as, for example, differences as to the measure of rescissory damages. *Compare Austin* v. *Loftsgaarden*, 675 F.2d 168 (8th Cir. 1982) and *Salcer* v. *Envicon Equities Corp.*, 744 F.2d 935 (2nd Cir. 1984) (rescissory damages reduced by tax benefits) *with Burgess* v. *Premier Corp.*, 727 F.2d 826 (9th Cir. 1984) (on which the Court of Appeal relied in ruling, as a matter of California law, that the class recovery should not be reduced by the substantial tax benefits received by *Danzig* class members from their GGRB investments). *See Appendix*, pp. A10-12. Similarly, in Colorado and Florida, where three of the class representatives resided, an investor who fails to read nonfraudulent, definitive offering materials and signs a subscription statement disclaiming reliance on any representation not contained therein may not recover for other allegedly fraudulent statements. *See Canon City Industrial Stores Co.* v. *McInerney*, 71 Colo. 492, 208 P. 457 (1922); and *Morton* v. *Young*, 311 So.2d 755 (Fla.App. 1975). *See also Zobrist* v. *Coal-X, Inc.*, 708 F.2d 1511 (10th Cir. 1983).

California's application of its laws and policies to offers and sales of securities by a Colorado issuer, in which California has no interest, to 42 purchasers in 12 other states that have a substantial interest in the transactions offends common sense and fundamental fairness. Neither the Grynbergs nor the nonresident purchasers rationally could have anticipated that their transactions would be governed *ex post facto* by California law; none then had any reason to shape their conduct or transactions so as to conform to California's laws and policies. *See Kulko* v. *Superior Court of California*, 436 U.S. at 97.

As a consequence of the California courts' assertion of jurisdiction over nonresident class members having no contacts with California and the application of California law to the entire *Danzig* class action, a citizen of New York who has

invested in activities in Colorado, Wyoming, and Utah may have his rights determined to his detriment by California law. This may occur simply because a Californian he has never met has brought a class action in California that purports to embrace our New Yorker. No conceivable legitimate public policy of California justifies that result. Under the California rulings in *Danzig*, an issuer in a national securities offering may satisfy the securities laws of the United States and 49 other states only to have a California court, in a California class action, order nationwide rescission of all sales for violation of California standards.

In *Danzig*, the California courts granted the class-action plaintiffs the right to choose not only the forum in which to have their claims heard, but also the right to choose the governing law. The California courts thus completely disregarded the recent holding of this Court that, "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its laws is neither arbitrarily nor fundamentally unfair." *Allstate Ins. Co.* v. *Hague*, 449 U.S. 312-13.

The California courts' holdings intolerably permit California to adjudicate a nationwide class action and apply California law without *any* contacts among the dispute, the parties, and California. Under California's approach to choice of law, the mere institution of a class action in California provides the foundation for applying California law indiscriminately. In the class action context, contract rights, settled interests, and definite expectations of United States citizens, intimately related to a state other than California or citizens of another state, may be shattered on a tremendous scale. Of equal constitutional significance is another inescapable implication of California's application of its law in *Danzig*: the substantial interests of other sovereign states having unquestionable contacts with the nonresidents of California and their claims or defenses may be invaded with impunity or simply ignored. These cases simply cannot be

e .empted from the normal choice of law rules without creating a "substantial threat to our constitutional system of cooperative federalism." *Nevada* v. *Hall*, 440 U.S. 410, 424 n. 24 (1979).

Only this Court can assure California's sister states, class-action defendants like the Grynbergs, and nonresident class members that their respective rights guaranteed by the laws of the state in which a contract is entered into, or property is located, or a tort occurs, will be respected in California. The California courts' holdings must be overturned in order to prevent a state court, when that state has no legitimate interest, from imposing forum law on transactions and citizens through the expedient of declaring a nationwide class action premised on nothing more than a common question of law or fact.

California's across-the-board application in *Danzig* of its law to persons, claims, and transactions in which California has no discernible interest, and with which California has no contacts, requires this Court's review. *Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930); *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U.S. 178 (1936).

II. The Absence of Any Effective Class Notice or Meaningful Opportunity to Opt Out of Class Treatment of the 1979 Rescission Claim Deprived the Grynbergs of Due Process.

Even if it should be concluded that the requirements of *International Shoe* and the cases following it do not apply to nonresident class members, *Danzig* should be reversed because the class-action procedures used totally failed to satisfy due process. The Kansas Supreme Court in *Shutts* placed pivotal reliance upon procedural due process in rejecting minimum contacts with absent class members as a jurisdictional prerequisite. *See Shutts* v. *Phillips Petroleum Co.*, 235 Kan.

195, 679 P.2d at 1170-71.[17] In *Danzig*, the California courts did not give or require class notice or an opportunity for absent class members to opt out of class treatment of the 1979 Rescission Claim.[18] Certification of that claim was delayed until judgment. These failures increase the importance of this Court's review of *Danzig*. In *Danzig*, the California courts not only lacked the minimum affiliating contacts necessary to a constitutional exercise of jurisdiction over absent, nonresident class members but also did not provide to the Grynbergs the procedural due process that the Fourteenth Amendment requires.

Notice to absent class members "is designed to fulfill requirements of due process to which the class action procedure is of course subject." Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 106-07 (1966), quoted in *Eisen* v. *Car-*

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17. The Kansas court twice stressed that "notice to absent members of the class . . . is particularly important, for it is the greatest single safeguard against inadequate representation. *Id.* at 1171, quoting *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 556, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978).

18. The 1976 class notice (*see Appendix*, p. A47) refers only to rescission of the 1974 *amendment* to the partnership agreement under which *some* of the class members had made additional capital contributions long after formation of GGRB. The original complaint sought to recover those additional funds for the sole benefit of those partners contributing the additional capital. With regard to *all* class members, the class notice refers only to claims for declaratory relief as to partnership assets allegedly distributable upon termination of the partnership, an accounting, breach of fiduciary duties and related damages — claims consistent only with enforcement of the GGRB agreement, not its rescission *ab initio* for fraud. The 1976 class notice neither furnishes information stating or intimating that the original GGRB agreement had been induced by fraud nor provides any opportunity to opt out of class adjudication of a claim for rescission of the partnership agreement in its entirety. In addition to an opportunity to opt out in order to prosecute a separate action or to appear by personal counsel, each investor should have been afforded an opportunity to compare the tax consequences of rescission of the GGRB agreement with the impact of its affirmation in the light of the individual financial circumstances of each class member. *Compare Austin* v. *Loftsgaarden*, 675 F.2d 168 (8th Cir. 1982); *Salcer* v. *Envicon Equities Corp.*, 744 F.2d 935 (2d Cir. 1984), *with Burgess* v. *Premier Corp.*, 727 F.2d 826 (9th Cir. 1984).

lisle & Jacquelin, 417 U.S. 156, 173 (1974). Adequate notice to absent, identifiable litigants and a meaningful opportunity for them to present objections are "elementary and fundamental" requirements of due process for any determination of property rights with finality. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Since *Mullane*, this Court has adhered "unwaiveringly" to that principle. *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 103 S.Ct. 2706; 77 L.Ed.2d 180, 186 (1983). That principle applies *a fortiori* to an action *in personam* like *Danzig*. *See Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, , n. 3, 103 S.Ct. 2706, 77 L.Ed.2d at 185-86, n. 3.

Moreover, a material amendment of a previously certified class complaint adding a new cause of action having economic consequences far greater than the originally certified claims raises independent jurisdiction and due process issues requiring recertification and new notice if class members are to be bound, even if the amendment arises from the same nucleus of operative facts. *Zenith Laboratories, Inc.* v. *Carter-Wallace, Inc.*, 64 F.R.D. 159 (D.N.J. 1974), *aff'd*, 530 F.2d 508 (3d Cir. 1976), *cert. denied*, 429 U.S. 828 (1976), and *Matarazzo* v. *Friendly Ice Cream Corp.*, 70 F.R.D. 556 (E.D.N.Y. 1976).[19]

Danzig presents, not just defective notice, but no notice at all until after judgment, of the 1979 Rescission Claim. Although state courts have a wide latitude under the Constitution of the United States to precribe class procedures, they must afford "such notice and opportunity to be heard which the Constitution prescribes." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). As in cases under Federal Rule of Civil Procedure 23(b)(3), state courts should be required by controlling precedent to direct the earliest and best practicable notice to all

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19. As noted in *Matarazzo:* "[Since] the nature of this new claim was certainly not made known to the members of the class when the original notice was published, . . . it is difficult to see how they will be bound one way or the other without a new notice . . . " 70 F.R.D. at 560. See Note 21, *infra*.

class members who can be identified through reasonable effort.[20] Due process requires no less.

Any class judgment entered without effective notice to class members who are readily identifiable, like in *Danzig*, violates the due process to which class-action defendants, like the Grynbergs, are entitled under the Constitution.[21] Permitting an action to be maintained as a class action usually transforms a relatively simple individual lawsuit into highly complex, expensive litigation. Fundamental fairness to class defendants requires that a class judgment, if entered, bind the entire class, preclude reassertion of the same claims and collaterally estop relitigation of identical issues. *See Cooper* v. *Federal Reserve Bank of Richmond*, ___U.S. ___, 104 S.Ct. 2794, 81 L.Ed.2d 718, 726 (1984); *Hansberry* v. *Lee*, 311

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20. As stated in Justice Powell's majority opinion in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 176, each class member "who can be identified through reasonable effort *must* be notified that he may request exclusion from the action and thereby preserve his opportunity to pass his claim separately or that he may remain in the class and perhaps participate in the management of the action." [Emphasis added].

21. The Grynbergs' federal due process objections to the class certification procedures followed by the trial court were adequately raised before and considered by the California Court of Appeal and are properly before this Court. *See, e.g., Braniff Airways* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599 (1954). The Court of Appeal stated that it did not reach the Grynbergs' "due process and notice arguments" because the "Grynbergs . . . [failed] to move timely to decertify or recertify the class [and thereby] effectively waived *any* objections to the class certification . . . [emphasis added]." *Appendix*, p. A7. The Court of Appeal then went on to conclude that any error in failing to provide additional notice of the 1979 Rescission Claim was "clearly harmless." *Id.* p. A 8, n. 5. *See also* Note 6, *supra*.

That conclusion of the Court of Appeal is diametrically opposed to this Court's "short answer . . . that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case [under Federal Rule of Civil Procedure 23]." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 176. Until class certification is followed by notice, members of a potential class are "mere passive beneficiaries" who do not "have any duty to take note of the suit." *American Pipe & Steel Construction Co.* v. *Utah*, 414 U.S. 538, 552 (1974).

U.S. at 40-41 (1940); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921). *See also Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973).[22] If the class judgment does not have these consequences, class-action procedures arbitrarily compel class-action defendants, like the Grynbergs, to assume a vastly enhanced exposure to liability and damages, to suffer a tolling of statutes of limitation, to submit to broader discovery, to incur considerable additional expense and to be otherwise disadvantaged unfairly for no justifiable reason. This Court should make clear that the Fourteenth Amendment does not permit such consequences to result arbitrarily from multistate class actions in state courts.

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22. The Grynbergs' standing to assert questions concerning jurisdiction over nonresident, nonappearing class members is established by their "personal stake" in the outcome of the controversy. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Manifestly, California's assertion of expansive class-action jurisdiction has exposed the Grynbergs to liability far exceeding that which would be constitutionally permissible in the absence of a class action. Any impermissible exercise of jurisdiction is exacerbated by the "one-way intervention" permitted to absent class members after defective or a complete absence of notice and class certification proceedings. *See American Pipe & Steel Construction Co.* v. *Utah*, 414 U.S. at 574. The Grynbergs have abundant incentive to prosecute these issues vigorously. *See Craig* v. *Boren*, 429 U.S. 190, 194 (1976). The Grynbergs are in the same posture as "any defendant affected by the court's judgment who possesses the 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Hanson* v. *Denckla*, 357 U.S. at 245, quoting *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83 (1958).

CONCLUSION

For all reasons stated, the Grynbergs' Petition for a Writ of Certiorari should be granted. The pendency of *Phillips Petroleum Co.* v. *Shutts* and need for uniformity of decision in multistate class actions in state courts require review of the decision of the California Court of Appeal.

Respectfully submitted,

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APPENDIX

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

FEBRUARY 14, 1985

I have this day filed Order _____

HEARING DENIED

In re: 1 Civ. No. A014853

PAUL DANZIG

vs.

JACK GRYNBERG & ASSOCIATES

Respectfully,

Clerk

IN THE

Court of Appeal of the State of California

FIRST APPELLATE DISTRICT

DIVISION ONE

PAUL DANZIG ET AL.,

Plaintiffs and Respondents,

v.

JACK GRYNBERG & ASSOCIATES ET AL.,

Defendants and Appellants.

(AO 14853)

(S. Ct. No. 462022-4)

This appeal is taken by defendants Jack J. Grynberg, doing business as Jack Grynberg & Associates, and his wife Celeste Grynberg, from a judgment rendered by the court (sitting without a jury) in favor of plaintiffs individually and as class representatives of all limited partner investors in an oil and gas limited partnership known as the "Greater Green River Basin Drilling Program 72-73" (hereafter GGRB).[1] Following an extended trial the court entered its judgment in favor of plaintiff class on a theory of rescission grounded upon findings of fraudulent misrepresentations and nondisclosures in inducing the members of plaintiff class to subscribe to limited partnership interests in, and to contribute working capital to, the GGRB partnership venture. The judgment provided, inter alia, for restitution to the class in the total sum of approximately $4.1 million and compensatory damages in the total sum of $2.2 million together with punitive

1. Although the Grynbergs have filed separate appeals, Celeste Grynberg concedes that most of the issues raised in Jack J. Grynberg's appeal are common issues which she adopts by reference. Except as otherwise indicated, our discussion relates to both appeals.

damages against defendant Jack J. Grynberg only in the total sum of $431,000, the punitive award to be apportioned among the class members in accordance with their prorated interests.

On appeal defendants attack the validity of the class certification and resulting judgment, the sufficiency of the evidence in support of the findings and the award of damages. Celeste Grynberg separately raises a jurisdictional challenge to the judgment against her. For the reasons which we explain, we conclude that no reversible error is shown, and accordingly affirm the judgment.

Procedural and Factual Background

The underlying action arose from a 1972 public offering by defendant Grynberg of limited partnership interests in GGRB, in which Grynberg was designated as the sole general partner. The partnership purpose was to explore for oil and gas drilling prospects and potential production in the Greater Green River Basin of Colorado, Utah and Wyoming upon oil and gas leases held either by Grynberg or his wife Celeste Grynberg. Through an active solicitation program conducted in over a dozen states, Grynberg sold the eventual $4 million registered offering to approximately 55 limited partner investors in subscription units of $200,000 each, or fractions thereof. The largest number of investors, including the named plaintiffs, were California residents. The principal sales tool was the written prospectus which was amended several times during the course of the public offering. The original or preliminary prospectus provided that in consideration for a 50 percent interest, the general partner (Grynberg) "shall commit" certain oil and gas leases to some 200,000 acres in the basin and other areas; in response to an official SEC inquiry as to the meaning of the word "commit," the prospectus was amended to provide that approximately 202,000 net acres in the tri-state area held under leases owned by the Grynbergs would not be used by the general partner for his own account but Grynberg "shall make them available

to the Partnership" for inclusion within drillable prospect areas. Identical language was contained in the next four versions of the revised prospectus. Two of the revised documents were accompanied by written summary sheets outlining key features of the proposal together with page references to the prospectus itself. The summary sheets repeated the language contained in the earlier versions of the prospectus concerning commitment of leases.[2]

The partnership commenced actual operations on December 1, 1972. On December 21, 1972, the Grynbergs transmitted a letter to the limited partners which purported to assign to the partnership their interests in the oil and gas leases. However, the Grynbergs' recorded assignments of the leases, unknown to the limited partners, specified a right of reversion upon termination of the partnership: December 31, 1974, or whenever the capital contributions were exhausted, whichever first occurred.

By the summer of 1974 the partnership operating capital was virtually expended. At about the same time, Grynberg obtained an amendment to the partnership agreement to permit additional contributions by the limited partners in conjunction with the Kent Ranch drilling project. Thereafter he solicited and obtained approximately $400,000 in "voluntary contributions" from some of the investors. The Kent Ranch well was eventually abandoned.

In 1975 the named plaintiffs filed the underlying suit individually and on behalf of all of the limited partners of

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2. Each prospectus, seven in total, consisting of nearly 100 pages of single-spaced print, was identical in appearance and format. Although those subsequently circulated bore the label "amendment no. _____," no covering letter or memorandum was provided explaining or otherwise indicating the nature of the amendments. The summary sheets included with the fifth and seventh prospectuses (Post-Effective Amendments Nos. 1 and 3) declared: "12. *AMOUNT OF ACREAGE COMMITTED TO THE PARTNERSHIP BY GENERAL PARTNER*: (Ref. p. 18) [¶] Approximately 200,000 gross acres (principally in the Greater Green River Basin)."

GGRB.[3] Following a hearing plaintiffs' action was certified as a class action, and notice was sent to all limited partners. None opted out of the lawsuit.

At the pretrial conference held in 1979 plaintiffs were permitted to amend their complaint to seek rescission and restitution on an alternative theory (in the event the subject leases were not distributable assets of the partnership) that the plaintiff class had been detrimentally misled by the material representations contained in the amended versions of the prospectus and summary sheets. Following the overruling of defendants' demurrer, trial commenced on the issues framed in the complaint as amended. After submission of the cause, the court filed its notice of intended decision granting relief to plaintiff class in the form of rescission and restitution of their net capital contributions together with accrued interest and punitive damages against Jack Grynberg alone, assessed on the basis of 10 percent of each contribution.

The common thread running through the court's extensive findings in support of rescission and damages was the fraudulent misrepresentations and nondisclosures of Grynberg with respect to the summary sheets' characterization that the leases would be committed as partnership assets, and the related failure to reveal to plaintiff class that the leases which were not drilled would revert to the Grynbergs upon termination and dissolution of the partnership; that such misrepresentations and nondisclosures were intentional and willful in order to induce the plaintiff class to

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3. The first four causes of action focused on the 1974 partnership amendment (permitting the general partner to obtain voluntary contributions to finance the Kent Ranch prospect) and alleged in substance: 1) that the solicitation violated the partnership agreement by diluting the pro rata interests; 2) that Grynberg fraudulently obtained the favorable votes; and 3) that the additional contributions were personally retained by Grynberg. The fifth and sixth causes concerned the status of the oil and gas leases: the former for declaratory relief and the latter for an accounting on the theories of fiduciary breach. The seventh cause of action alleged a breach of fiduciary duty based on mismanagement and lack of good faith in conducting drilling activities.

subscribe to partnership interests. Moreover, the court explicitly found that the members of plaintiff class reasonably and justifiably relied upon such misrepresentations and nondisclosures in purchasing their respective partnership interests; that but for such fraudulent conduct the members of plaintiff class would not have subscribed to the limited partnership offering as paid investors.

In determining that plaintiff class was entitled to rescission, compensatory and punitive damages, the court also ordered restoration of the leases, producing wells and other partnership assets to the Grynbergs together with certain enumerated compensating offsets.

I. Class Certification

Grynberg first argues that once the complaint was amended changing its focus from one of enforcement of the partnership agreement to that of avoidance based upon allegations of common law fraud implicating conflict-of-law issues, the original class certification was vitiated and a class judgment was improper. Plaintiff class responds that Grynberg's failure to move timely to decertify the class certification after the complaint was amended constituted a waiver of any objections to such certification. We agree.

The thrust of Grynberg's challenge to the class judgment is directed at the alleged lack of community of interest of the diverse members of the class. The claim comes too late. The proper time to challenge the procedural propriety of a class action is *before* proceedings have been undertaken on the merits; judicial review, if necessary, is available by extraordinary writ. (*Blue Chip Stamps* v. *Superior Court* (1976) 18 Cal.3d 381, 387, fn. 4.)

California decisions uniformly hold that the propriety of a class action must be decided at the earliest possible stage. (*Home Sav. & Loan Assn.* v. *Superior Court* (1974) 42 Cal.App.3d 1006, 1010 [error to bifurcate trial to decide liability first]; *Massey* v. *Bank of America* (1976) 56 Cal.App.3d 29, 32 [dismissal sanction proper for delay in determining

propriety of class action].) That determination may be made either on motion of a party or by the court *sua sponte*. (*City of San Jose* v. *Superior Court* (1974) 12 Cal.3d 447, 453-454.) Once the initial determination has been made, a motion to decertify the class action may be used whenever changed circumstances render class status no long appropriate. (*Occidental Land, Inc.* v. *Superior Court* (1976) 18 Cal.3d 355, 360.) But a request for decertification must be made before a decision on the merits. (*Green* v. *Obledo* (1981) 29 Cal.3d 126, 145-149.)

Herein, Grynberg registered no formal objections to the initial certification of the class. Indeed, he conceded that the action may be a "proper class action" while expressing concern only that divergent views within the class be represented. Nor did he move to decertify the class after the amendment to the complaint seeking rescission.

Grynberg's challenge to the class certification was raised for the first time in his objections to the proposed findings of fact.[4] His argument that the objections were timely since formal *judgment* had not yet been entered is unpersuasive. The very purpose in requiring pretrial determination of class issues is to avoid precisely what happened here: passive acquiescence to class certification awaiting results of trial, and if unfavorable, then belatedly attacking the class certification order as improper. (*Civil Service Employees Ins. Co.* v. *Superior Court* (1978) 22 Cal.3d 362, 373-374 [objections to class certification after granting of partial summary judgment untimely]; *Green* v. *Obledo*, *supra*, 29 Cal.3d at pp. 147-149 [same: motion to decertify after partial summary judgment].) We conclude that Grynberg's failure to move timely to decertify or recertify the class effectively waived any objections to the class certification based on a claim of changed circum-

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4. Although Grynberg pleaded lack of community interest as an affirmative defense in his answer to the amended complaint filed on the first day of trial, the issue thus joined for trial did not constitute a demand for decertification prior to a decision on the merits. (Cf. *Employment Development Dept.* v. *Superior Court* (1981) 30 Cal.3d 256, 262-264.)

stances. (Cf. *Civil Service Employees Ins. Co.* v. *Superior Court, supra*, 22 Cal.3d at pp. 372-373.) In view of our determination, it becomes unnecessary to discuss Grynberg's related due process and notice arguments.[5]

II. Sufficiency of Evidence

While mindful of the general principles governing review of a claim of insufficient evidence (*Munoz* v. *Olin* (1979) 24 Cal.3d 629, 635-636; *Nestle* v. *City of Santa Monica* (1972) 6 Cal.3d 920, 925), Grynberg contends that as a matter of law there was no competent evidence of justifiable reliance or fraudulent inducement. Our review of the record under applicable principles compels a contrary conclusion.

Grynberg's claim of unjustified reliance is based largely, if not exclusively, on the disclaimer language contained in the subscription agreement form signed by each of the limited partners.[6]

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5. Parenthetically, we think Grynberg's contention that disparate, but nonexclusive, oral representations preclude class proof is meritless. In *Occidental Land* v. *Superior Court, supra*, 18 Cal.3d 355, a virtually identical argument was rejected where, as here, written representations common to the class were made. (*Id.*, at p. 361.) Nor does his companion claim of differing state laws governing fraud suggest a contrary determination where, as here, such theory is urged for the first time on appeal (*Estate of Patterson* (1980) 108 Cal.App.3d 197, 207); unless a party timely invokes the law of a foreign state, the law of the forum will apply. (*Hurtado* v. *Superior Court* (1974) 11 Cal.3d 574, 581.) Finally, we discern no prejudice to Grynberg by reason of the failure to provide notice to the class of the amendment seeking the different *remedy* of rescission. Since plaintiff class received adequate notice of the original complaint alleging the same ultimate factual averments underlying the rescission theory of relief, separate lawsuits by individual members could not be successfully maintained. In any case, since the judgment was returned in favor of plaintiff class, none of whose members earlier chose to opt out, the error — if any — in failing to provide additional notice, was clearly harmless.

6. The operative language states that the signatory limited partner acknowledges that he is "not acting on the basis of any representation or warranties other than those contained in the aforementioned Prospectus [dated September 15, 1972]."

It is well established that a party to an agreement induced by fraudulent misrepresentations or nondisclosures is entitled to rescind, notwithstanding the existence of purported exculpatory provisions contained in the agreement. (*City of Salinas* v. *Souza & McCue Construction Co.* (1967) 66 Cal.2d 217, 223-224.) The rule of non-immunity has been stated by a leading commentator in the following language: "A party to a contract who has been guilty of fraud in its inducement cannot absolve himself from the effects of his fraud by any stipulation in the contract, either that no representations have been made, or that any right which might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision." (1 Witkin, Summary of Cal. Law (8d ed. 1973) Contracts, § 326, p. 274.) Although the trial court found that each member of plaintiff class reasonably believed the statements contained in the subscription agreement were true, it also found that the language contained in the several prospectuses was unclear and confusing and that the solicited class members were then unaware of the material language changes or "true facts concerning the status of the leases" and Grynberg's related intent; further, that under such circumstances the class members reasonably and justifiably relied on the written summary sheets which purported to explain material changes in the partnership proposal. The reasonableness of that reliance presented a question of fact. (*City of Salinas* v. *Souza & McCue Construction Co.*, *supra*, 66 Cal.2d at p. 224; *Winn* v. *McCulloch Corp.* (1976) 60 Cal.App.3d 663, 671.) When such

findings are supported by substantial evidence, as here shown, they are binding on appeal.[7]

Grynberg's remaining claim of an evidentiary void in support of the findings of fraudulent inducement of the absent class members suffers from a similar analytical defect.

Addressing a similar argument of the necessity for independent proof of individual reliance of all class members, our highest court has consistently held if the trial court finds material misrepresentations were made to class members, "at least an inference of reliance would arise as to the entire class." (*Vasquez* v. *Superior Court* (1971) 4 Cal.3d 800, 814; *Occidental Land, Inc.* v. *Superior Court*, *supra*, 18 Cal.3d at p. 363.) Indeed, this court reached the very same conclusion during its earlier interlocutory review of a discovery issue in *Danzig* v. *Superior Court* (1978) 87 Cal.App.3d 604, 613. The evidence and supporting inferences which may be drawn sustain the trial court's express findings of justifiable reliance on the common fraudulent misrepresentations and nondisclosures inducing the purchase of the limited partnership interests.

III. Damages

Grynberg presents two claims of error regarding the award of damages.

He first argues that the trial court erred in applying California law as to the measure of damages to non-resident class members instead of the law of each state of residence. As

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7. We reject Grynberg's related contention that the failure of the plaintiff class members to read the amended prospectuses, appropriately referenced in the summaries, amounts to unreasonable reliance as a matter of law. As noted, the issue is a factual one. The argument conveniently overlooks the court's explicit finding that the failure to read the prolix provisions of the several prospectuses was induced by Grynberg's active concealment of the *material* changes and his persistent use of the deceptive term "commit" in the written summary sheets. When such failure has been fraudulently induced, as here found, relief by way of rescission is amply justified. (Witkin, *op. cit. supra*, § 323, pp. 271-272.)

earlier noted, it is the general rule that the law of the forum state applies unless a party litigant makes a *timely* request to invoke the law of a foreign state. (*Hurtado* v. *Superior Court*, *supra*, 11 Cal.3d 574, 581.) Here, Grynberg at no time requested that the law of the state of each class member be applied. A request made for the first time on appeal is untimely, and any objection to the choice of law is deemed waived. (*Estate of Patterson*, *supra*, 108 Cal.App.3d 197, 207.)

Second, relying on *Austin* v. *Loftsgaarden* (8th Cir. 1982) 675 F.2d 168, Grynberg argues that the restitution damages should have been reduced by the tax benefits enjoyed by plaintiff class in the form of write-offs. In his supplemental letter of August 8, 1984, however, Grynberg candidly acknowledges that *Austin* has been disapproved in the recent decision of *Burgess* v. *Premier Corp.* (9th Cir. 1984) 727 F.2d 826, 838, which reasoned that the suggested offset allowance would result in "the government bearing the cost of defendants' fraud . . . [concluding] that the economic benefit by way of tax deductions is illusory because amended returns will have to be filed under the tax benefit rule. [Citation.]" (See also *Cereal Byproducts Company* v. *Hall* (1958) 16 Ill.App.2d 79 [147 N.E.2d 383, 384] affd., 15 Ill.2d 313 [155 N.E.2d 14] [credit for tax refund disallowed in action against auditor for negligent failure to discover embezzlements].)

Although we have found no California cases squarely on point, we are persuaded that the *Burgess-Hall* rule, that tax consequences are irrelevant to the recovery of damages, is better reasoned. (Cf. *Rodriguez* v. *McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 665-668 [income tax consequence of lost income in personal injury action irrelevant]; *Canavin* v. *Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 522-523 [same]; *City of Los Angeles* v. *Tilem* (1983) 142 Cal.App.3d 694, 707-708 [tax benefits to property owner from inverse condemnation award irrelevant]; *Henninger* v.

Southern Pacific Co. (1967) 250 Cal.App.2d 872, 878-879 [tax exemption of personal injury award irrelevant].)[8]

We conclude that the tax benefits, if any, enjoyed by plaintiff class members as a result of their partnership investments are irrelevant to the restitution award of damages.

Appeal of Celeste Grynberg Only

Defendant Celeste Grynberg challenges the validity of the judgment against her on the additional grounds of lack of personal jurisdiction, absence of evidence of culpable fraud and denial of procedural due process. We discuss the separate contentions in the order presented.

The original complaint naming Celeste Grynberg as a party defendant was served upon her by mail at her Colorado residence. Following denial of her motion to quash service of summons, she filed a petition for mandamus relief which this court summarily denied. (1 Civ. 37310.) Thereafter, Celeste Grynberg made a general appearance by filing an answer to the original complaint, followed by her answer to the amended complaint, and proceeded to trial on the merits.

At the close of plaintiff's case in chief, the trial court granted Celeste Grynberg's motion for judgment limited to the issue of punitive damages. (See Code Civ. Proc., § 631.8.) At close of trial the court expressly found that Grynberg had at all relevant times acted as the agent of Celeste Grynberg with her knowledge and permission; and that Celeste Grynberg had ratified such agency by executing lease assignments to the partnership and accepting the benefits there-

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8. *Froid* v. *Fox* (1982) 132 Cal.App.3d 832, cited by Grynberg, is readily distinguishable. That case involved an action by defrauded realty investors seeking recovery from the statutorily created Real Estate Education, Research and Recovery Fund, permitting reimbursement of an "actual and direct loss." In considering tax benefits occasioned by the investment losses, the court characterized the action as one for indemnification and distinguished the factual situation presented by an ordinary fraud action for damages. (*Id.*, at pp. 838-839.)

from. The court thereafter entered its judgment holding all of the named "defendants," which included Celeste Grynberg, jointly and severally liable for compensatory damages. In February 1981 the court granted plaintiffs' motion pursuant to Code of Civil Procedure section 662 to modify the judgment nunc pro tunc clarifying Celeste Grynberg's joint and several liability for compensatory damages.

Celeste Grynberg's jurisdictional attack based upon the absence of "minimum contacts" (*Internat. Shoe Co.* v. *Washington* (1945) 326 U.S. 310, 316) need only be briefly discussed in view of her failure to preserve such objection for review. Once she entered a general appearnce by answering the complaint and thereafter proceeded to trial on the merits, she effectively waived any jurisdictional objection and cannot now assert the objection on appeal. (*McCorkle* v. *City of Los Angeles* (1969) 70 Cal.2d 252, 257-258.)[9]

Nor is there any merit in the contention of insufficient evidence to support the fraud judgment against her for compensatory damages. Liability was fastened solely upon findings of agency between Celeste Grynberg and her husband. Grynberg himself testified that he managed her leases with her knowledge and regularly discussed the business transactions concerning said leases with her. Moreover, the prospectus itself specifically stated that the leases of Celeste Grynberg would also be committed to the partnership. Finally, Celeste Grynberg also executed the lease assignments to the partnership and participated in the economic benefits derived from the lease rentals and cost reimbursements for unproductive drilling prospects. Such evidence constituted substantial evidence in support of the critical findings and must be respected on appeal. (*Nestle* v. *City of Santa Monica, supra*, 6 Cal.3d 920.) It is of no legal significance that Celeste Grynberg herself did not actively participate in the

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9. In view of our determination, it is unnecessary to examine plaintiffs' related jurisdictional defense based on a theory of purposeful intrastate economic activities (see *Buckeye Boiler Co.* v. *Superior Court* (1969) 71 Cal.2d 893; cf. *Ratcliffe* v. *Pedersen* (1975) 51 Cal.App.3d 89).

fraudulent activities of Jack Grynberg concerning the leases since even an innocent principal will be held liable for the unauthorized acts of an agent acting on his behalf. (See, e.g., *Alhino* v. *Starr* (1980) 112 Cal.App.3d 158, 174; *Spahn* v. *Guild Industries Corp.* (1979) 94 Cal.App.3d 143, 156; *Blackburn* v. *Witter* (1962) 201 Cal.App.2d 518, 520-522; *Eamoe* v. *Big Bear Land & Water Co.* (1950) 98 Cal.App.2d 370, 372-374; *Grigsby* v. *Hagler* (1938) 25 Cal.App.2d 714; see generally 1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency and Employment, §§ 177-180, pp. 775-777.)

Finally, we conclude that no due process violation occurred as claimed. The basis of that claim consists solely of the court's remarks that it saw no "basis" to order judgment against Celeste Grynberg in view of the absence of any evidence of *active* participation in Grynberg's fraudulent conduct. The language upon which Celeste now seizes occurred during the colloquy between court and counsel relating to the issue of liability surrounding the 1974 assessment. After granting summary relief in favor of Celeste limited to the punitive damages claim, the court explained that the scope of its ruling was intended to remove any basis "for imposing punitive damages or fraud penalties" thus eliminating any need to present evidence negating fraud "in relation to her behavior and conduct." The judgment against Celeste Grynberg was taken solely on the basis of her husband's conduct while acting as her agent. Celeste had ample opportunity to refute that theory of liability; yet, no contrary *evidence* was presented or suggested, either at trial or during the hearing on the motion for new trial.[10] The court ultimately concluded that no facts were shown to support a potentially different result. Even were we to assume that Celeste was somehow misled by the court's earlier isolated remarks, we would conclude that on the strength of the entire record, such error was harmless. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

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10. We agree with plaintiffs' argument that the declarations supporting Celeste's denial of knowledge of Grynberg's fraud are immaterial to the issue of liability premised on the agency relationship.

The judgment against Jack J. Grynberg and Celeste Grynberg, and each of them, is affirmed.

CERTIFIED FOR PUBLICATION:

_____

Racanelli, P. J.

We concur:

_____

Elkington, J.

_____

Rushing, J.*

* Assigned by the Chairperson of the Judicial Council

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Trial Judge:	Gordon Minder
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DANZIG v. GRYNBERG
AO 14853

Court of Appeal of the State of California

IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION ONE

PAUL DANZIG, ET AL.,
Plaintiffs and Respondents,
vs.
JACK GRYNBERG & ASSOCIATES, ET AL.
Defendants and Appellants.

No. AO14853

Alameda Superior Court No. 462022-4

BY THE COURT:

The motion for partial dismissal of appeal is denied without prejudice to the review of the issues of jurisdiction, choice of law and class certification upon review of the appeal on its merits.

Dated: June 24, 1983

Racanelli, P.J.

Superior Court,
State of California
FOR THE COUNTY OF ALAMEDA

PAUL DANZIG, ET AL.

Plaintiffs,

vs. **No. 462 022-4**

JACK GRYNBERG & ASSOCIATES, ET AL.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial of the within action commenced on February 14, 1980, before the Honorable Spurgeon Avakian presiding without a jury, the parties having waived trial by jury and stipulated to trial by the Court. Bancroft, Avery & McAlister by Sandra J. Shapiro and Janet Friedman appeared as attorneys for the plaintiff class and Fishman & Geman by William Fishman, Haas & Pahlmeyer by Jason Pahlmeyer, and Neil Ayervais, appeared as attorneys for defendants. Oral and doumentary evidence were introduced, trial briefs were filed and the matter was submitted:

The Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. In 1972 defendants solicited the members of the plaintiff class to become limited partners in a proposed limited partnership to be formed by defendants for the purpose of exploring for oil and gas. Said partnership was to be known as the Greater Green River Basin Drilling Program 72-73, limited partnership (hereinafter "GGR").

2. A partnership agreement for GGR was recorded in the City and County of Denver, State of Colorado on May 12, 1972. Under the terms of the proposed partnership, the general partner was to hold a 50% interest in the said partnership and the income and profits thereof; the limited partners were to hold a 50% interest pro rata in said partnership and the income and profits thereof, in accordance with their respective purchases of limited partnership interests in the partnership. The maximum capitalization of the partnership was specified to be $4,000,000; all of said capitalization was to be contributed by the purchasers of limited partnership interests. Limited partnership interests were sold in units. The price per unit was $200,000. Members of the class purchased either whole units or fractional parts of units.

3. At all times relevant hereto, the general partner of GGR was defendant Jack Grynberg & Associates, a sole proprietorship, owned by defendant Jack Grynberg.

4. At all times relevant hereto, defendants Jack Grynberg and Celeste Grynberg were, and are, husband and wife.

5. At all times relevant hereto, defendants, and each of them, were residents of the State of Colorado.

6. The plaintiff class consists of all of the purchasers of limited partnership interests in GGR. The members of the plaintiff class, together with the state of residence of each member of the class are identified on Exhibit A hereto, which said exhibit is hereby incorporated herein by this reference.

7. Each member of the plaintiff class purchased a limited partnership interest in GGR. The total subscriptions to GGR by the members of the plaintiff class was $4,000,000. The percentage interest in the limited partnership purchased by each member of the plaintiff class is set forth on Exhibit B, column 1, which said Exhibit is hereby incorporated herein by this reference.

8. Defendants solicited purchases of limited partnership interests from residents of many states including, but not limited to, the State of California. In pursuing said solicitation efforts, defendants traveled to various states, including the State of California, mailed prospectuses and partnership agreements to persons residing in many states, including the State of California, and engaged in telephone conversations with persons in various states, including the State of California.

9. During the course of their sales solicitations, defendants prepared seven successive versions of the prospectus and partnership agreement with regard to GGR. Defendants delivered to each member of the plaintiff class a copy of each successive version of said prospectus and partnership agreement prior to execution of the subscription agreements by which the members of the plaintiff class purchased their respective interest in GGR.

10. The prospectus for GGR constituted part of the partnership agreement.

11. Each successive version of the prospectus and partnership agreement which was sent to each member of the plaintiff class was identical in physical form and format. Various changes were made in each version of the prospectus; most of the changes were not substantive. However, Amendment No. 2 contained a material change in language with regard to the contribution to be made by the general partner in consideration for its interest in GGR. Defendants did not in any way disclose to any member of the plaintiff class that any material change had been made in the language of the later versions of the prospectus describing the contribution which would be made by defendants in return for the general partner's interest in the partnership.

12. Prior to execution of the subscription agreements to GGR by the members of the plaintiff class, defendants caused written summaries of the GGR prospectus and agreement to be sent to each member of the plaintiff class; the summaries

purported to summarize and explain the material terms of the partnership.

13. The final versions of the prospectus and agreement are unclear and confusing with regard to the contribution to be made by the defendants in return for the general partner's interest in GGR. The members of the plaintiff class were entitled to rely upon the summaries and the other representations made by the defendants with regard to the contribution to be made by the defendants to the partnership in return for the general partner's interest in the partnership.

14. The members of the plaintiff class justifiably believed that the summaries provided that the oil and gas leases which were owned by and which were acquired in the Greater Green River Basin by defendants Jack and Celeste Grynberg would be contributed by them to GGR as assets thereof, and that said leases would be distributed pro rata to all of the partners of GGR upon termination of the partnership. The members of the plaintiff class justifiably believed that the summaries correctly and adequately reflected the provisions of the prospectus and partnership agreement. The members of the plaintiff class justifiably relied upon the provisions of the summaries in subscribing to limited partnership interests in GGR and in making their respective contributions to capital of GGR.

15. At the time of the distribution of the summaries to the members of the plaintiff class, defendants knew that the members of the plaintiff class would be likely to be misled by the language of the summaries concerning the true intention of the defendants with regard to the contribution of the subject leases as assets of GGR.

16. The members of the plaintiff class were induced by the acts and misrepresentations of the defendants not to read with care the final versions of the prospectus issued by defendants; and the members of the plaintiff class justifiably relied on the acts and conduct of defendants in failing to ascertain or understand the changes in language which

defendants caused to be included in the final versions of the prospectus.

17. At all times prior to execution of their subscription agreements, and at all times prior to making their respective payments for GGR, each member of the plaintiff class justifiably believed that defendants Jack and Celeste Grynberg would contribute the leases held by them in the Greater Green River Basin, together with all leases subsequently acquired by them in that Basin, to GGR as assets of the partnership, as the contribution of the general partner Jack Grynberg & Associates to said partnership, and that said leases would not revert to said defendants upon termination of the partnership but would be distributed to all partners pro rata.

18. At the time of the solicitations by defendants of the members of the plaintiff class to purchase interests in GGR, and at the time of execution of their respective subscription agreements by the members of the plaintiff class, defendants Jack and Celeste Grynberg owned in excess of 200,000 acres of oil and gas leases in the Greater Green River Basin, located in the States of Colorado, Wyoming and Utah; some of the leases stood of record in the name of Jack Grynberg and some of the leases stood of record in the name of Celeste Grynberg. Said defendants acquired additional leases in said Basin during the term of GGR.

19. Prior to execution of subscription agreements for the purchase of limited partnership interests in GGR by the members of the plaintiff class, the defendants represented to each member of the plaintiff class that in consideration for the money to be contributed by the limited partners, and in consideration for the interest in GGR to be received by the general partner, defendants Jack Grynberg and Celeste Grynberg would contribute all of the oil and gas leases then owned by said defendants in the Greater Green River Basin, and all leases acquired by said defendants, or either of them, in the Greater Green River Basin during the term of the partnership, to GGR as assets of said partnership.

20. Prior to execution of subscription agreements for the purchase of limited partnership interests in GGR by the members of the plaintiff class, the defendants further represented to each member of the plaintiff class that the said leases owned or to be acquired by defendants Jack and Celeste Grynberg in the Greater Green River Basin would not revert to said defendants at the termination of the partnership, but would be distributed to all partners pro rata upon dissolution and termination of the partnership. They further represented as an advantage of GGR in contrast with other oil and gas ventures that his avoided any conflict of interest which might otherwise have arisen if leases not chosen by defendants for drilling were to revert to them.

21. At no time did defendants disclose to the members of the plaintiff class that the subject leases would not become assets of the partnership subject to distribution pro rata upon termination thereof, and that defendants did not intend to contribute said leases to GGR as assets thereof; defendants further failed to disclose to the members of the plaintiff class that the subject leases which were not drilled by the partnership would revert to defendants Jack and Celeste Grynberg upon termination of the partnership and that the limited partners would not acquire a pro rata interest in said leases upon termination and dissolution of GGR.

22. At all relevant times defendant Jack Grynberg acted on behalf of defendants Jack Grynberg & Associates and Celeste Grynberg in promoting the subject limited partnership and soliciting the members of the plaintiff class to purchase limited partnership interests in the subject partnership.

23. At all relevant times defendant Jack Grynberg was acting as the agent of defendants Jack Grynberg & Associates and Celeste Grynberg with regard to the solicitation of purchases of limited partnership interests in GGR by members of the plaintiff class.

24. At the time that the aforesaid representations were made they were untrue, and defendants knew that said representations were untrue; defendant Jack Grynberg knew that the leases of Jack and Celeste Grynberg would not be contributed to the partnership as assets thereof and further knew that the defendants did not intend the subject leases to become assets of GGR; defendants further knew that the defendants did not intend that the subject leases would be distributed pro rata to all of the partners upon termination of the partnership, but instead intended that the subject leases, except for those actually drilled by the partnership, would revert solely to defendants Jack and Celeste Grynberg upon termination of the partnership, and that the limited partners would have no interest in said leases.

25. At all relevant times, defendants knew that said misrepresentations and nondisclosures were material to the members of the plaintiff class and that the members of the plaintiff class would rely thereon; and defendants intended that each of said misrepresentations and nondisclosures induce the members of the plaintiff class to purchase limited partnership interests in GGR.

26. Common and similar misrepresentations were made to each member of the plaintiff class.

27. Common and similar nondisclosures were made to each member of the plaintiff class.

28. The aforesaid misrepresentations and nondisclosures were made by defendants to all members of the plaintiff class as part of a common plan and scheme.

29. The aforesaid misrepresentations were material to each member of the plaintiff class in executing subscription agreements to GGR and in making payments for GGR; said misrepresentations would have been material to a reasonable person in the same or similar circumstances as the members of the plaintiff class.

30. The aforesaid nondisclosures were material to each member of the plaintiff class in executing subscription agreements to GGR and in making payments for GGR; said nondisclosures would have been material to a reasonable person in the same or similar circumstances as the members of the plaintiff class.

31. At all relevant times each member of the plaintiff class believed the aforesaid representations to be true.

32. Each member of the plaintiff class was in fact induced to enter into his or her subscription agreement for the purchase of a limited partnership interest in GGR, and, further, to make his or her respective payments for GGR, by each of the aforesaid misrepresentations and nondisclosures.

33. The members of the plaintiff class did not learn the true facts concerning the status of the leases and the true intentions of the defendants with regard thereto until after they had made all of their payments for GGR.

34. Each member of the plaintiff class justifiably relied upon each of the aforesaid misrepresentations and nondisclosures in purchasing limited partnership interests in GGR and in making their respective payments for GGR; a reasonable person in the circumstances of the members of the plaintiff class at the time that the aforesaid misrepresentations and nondisclosures were made would have relied upon said misrepresentations and nondisclosures in purchasing limited partnership interests in said partnership and making capital payments for GGR.

35. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have purchased their respective interests in GGR.

36. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have become limited partners in GGR.

37. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class

would not have paid any of the sums which they in fact paid for GGR.

38. Defendants Jack and Celeste Grynberg both executed a document purporting to assign all of the subject leases to GGR; a copy of said document was sent to each member of the plaintiff class.

39. The subject leases were not in fact assigned or contributed to GGR by defendants Jack and Celeste Grynberg as assets of said partnership.

40. At all relevant times, the subject leases remained of record in the names of Jack and Celeste Grynberg except for such leases as expired or were sold, and with the exception of an assignment of certain leases which contained an express right of reversion of said leases to Jack and Celeste Grynberg upon termination of the partnership.

41. Defendants Jack and Celeste Grynberg did not contribute the leases acquired by them in the Greater Green River Basin during the term of the partnership to GGR as assets thereof; said defendants acquired and retained said leases in their own names.

42. Each of the members of the plaintiff class executed subscription agreements by which they purchased limited partnership interests in GGR.

43. At the time that the members of the plaintiff class executed said subscription agreements, they reasonably believed that the statements contained therein were true.

44. The total sum actually paid by each member of the plaintiff class upon the purchase price of his or her interest in GGR is set forth on Exhibit B hereto, column 2; the dates and amounts of each such payment made by each member of the plaintiff class is set forth in columns 3 and 4 of Exhibit B; said exhibit is hereby incorporated herein by this reference.

45. In 1974, defendants solicited additional capital contributions from the members of the plaintiff class in accor-

dance with a purported amendment to the partnership agreement.

46. Certain members of the plaintiff class made additional capital contributions by virtue of such solicitation. The name of each member of the plaintiff class who made such payments is set forth on Exhibit C. The date of each such payment and the amount of each such payment are set forth on Exhibit C, columns 1 and 2; said exhibit is hereby incorporated herein by this reference.

47. As a direct and proximate result of the aforesaid misrepresentations and nondisclosures, each member of the plaintiff class suffered damage in the amounts paid by each of them as contributions of capital to GGR, in the sums set forth on Exhibit D, column 1, which said exhibit is hereby incorporated herein by this reference.

48. Each member of the plaintiff class suffered, as consequential damages proximately caused by the misrepresentations and nondisclosures of defendants as aforesaid, the loss of the use of the money paid to defendants as contributions to capital of GGR as set forth in Finding No. 47, in an amount equal to 7% per annum from the date of each payment so made. The amounts of such damages suffered by each member of the plaintiff class are set forth on Exhibit B, column 5 and Exhibit C, column 3, which said exhibits are hereby incorporated herein by this reference; the total amount of such damages suffered by each member of the plaintiff class to the date of judgment herein is set forth on Exhibit E, column 2, which said exhibit is hereby incorporated herein by this reference.

49. Alternatively, each member of the class is entitled to interest upon the sums paid by each such member of the class as contributions to capital of GGR at the rate of 7% per annum from the date of each payment so made; the sums to which each member of the plaintiff class is so entitled are set forth on Exhibit B, column 5 and Exhibit C, column 3; the total amount of such interest is set forth on Exhibit E, column

2, which said exhibits are hereby incorporated herein by this reference.

50. The representations and fraudulent nondisclosures committed by defendant Jack Grynberg were intentionally made by said defendant.

51. In committing the acts, misrepresentations and nondisclosures set forth above, defendant Jack Grynberg acted wilfully, intentionally, maliciously and with a wanton and reckless disregard for the rights of the members of the plaintiff class.

52. By virtue of the wilful, intentional, fraudulent and malicious acts of defendant Jack Grynberg, as aforesaid, each member of the plaintiff class is entitled to punitive damages from said defendant in a sum equal to 10% of the principal amount paid by each said plaintiff as contributions to capital of GGR; the amount of punitive damages to which each said member of the plaintiff class is so entitled is set forth on Exhibit E, column 3, which said exhibit is hereby incorporated herein by this reference.

53. The only sums received by the members of the plaintiff class from defendants with regard to GGR were certain distributions of a portion of the income received by GGR from certain producing wells; the sums so received by each member of the plaintiff class are set forth on Exhibit D, column 2, which said exhibit is hereby incorporated herein by this reference.

54. The members of the plaintiff class received no sums or benefits by virtue of their purchase of their respective interests in GGR other than the sums set forth in Finding No. 53.

55. Defendants can and will adequately be restored to the *status quo ante* by transfer to them of all of the assets of GGR, and an offset against the sums to be repaid by defendants to plaintiffs of the sums set forth in Finding No. 53.

56. Defendants received benefits from the use of the funds paid by the members of the plaintiff class as contributions to capital of GGR.

57. The leases of defendants Jack and Celeste Grynberg in the Greater Green River Basin were benefitted by the sums contributed by the members of the plaintiff class for GGR.

58. Upon termination of the term of GGR, defendants asserted complete dominion and control over all of the leases which defendants had represented would become assets of GGR with the exception of certain leases located in producing prospects. Defendants further asserted that all said leases had reverted to defendants Jack and Celeste Grynberg. At all times after the date provided in the partnership agreement for dissolution of GGR, defendants Jack and Celeste Grynberg have treated the said leases as their sole property and have dealt with said leases as their property.

59. The members of the plaintiff class did not unreasonably delay assertion of their claims for fraud after learning the true facts.

60. Defendants would not have acted in any different manner nor would defendants have done anything differently nor would there have been any change in circumstances if the plaintiff class had asserted its claim for rescission of the partnership agreement at an earlier time.

61. Defendants did not suffer any prejudice by virtue of the fact that the plaintiff class first asserted its claim for rescission of the partnership agreement in their Amendment to the Complaint herein.

62. The members of the plaintiff class did not engage in acts which were inconsistent with their right to rescind the partnership agreement after they acquired knowledge of the aforesaid misrepresentations and nondisclosures.

63. On February 8, 1977, Viersen & Cochran Drilling Company, the firm which did the drilling on the first Kent

well, filed an action against Jack J. Grynberg, doing business as Jack Grynberg & Associates in the United States Federal Court for the District of Colorado, being action number 77-M-161 in the records of said Court. On July 5, 1977, defendant Jack Grynberg filed a third party complaint in that action against certain members of the plaintiff class. That third party complaint was dismissed by the district court on procedural grounds; there was no trial on the merits of any issue raised by the third party complaint. The Order of dismissal was appealed to the Tenth Circuit and was reversed by that Court by opinion dated Septemer 10, 1979.

64. The decision rendered by the Tenth Circuit on the appeal by Jack Grynberg & Associates from the aforesaid Order of Dismissal of said third party complaint in said action was not a decision rendered on the merits.

65. The Tenth Circuit did not decide, nor was any issue presented to that court with regard to, whether the partnership agreement of GGR was valid or enforceable against the limited partners or was subject to rescission by virtue of the misrepresentations and nondisclosures made to the limited partners which had induced them to purchase interests in said partnership.

66. Defendants voluntarily engaged in substantial activities within the State of California in the course of soliciting execution of subscription agreements and contributions to capital of GGR.

67. Representatives of defendants personally came to California to solicit purchases of limited partnership interests in GGR.

68. Defendants registered the prospectus and partnership agreement for GGR with the Commissioner of Corporations of the State of California; the prospectus registered with the Commissioner of Corporations expressly states that defendants Jack and Celeste Grynberg are owners of the aforesaid oil and gas leases.

69. More residents of California purchased limited partnership interests in GGR than residents of any other state; more residents of California are members of the plaintiff class than residents of any other state.

70. Defendants sold more partnership interests in the State of California than in any other state; seventeen of the original fifty-two purchasers of limited partnership interests are residents of the State of California; the next largest number of original purchasers by state of residence is six from the State of Texas and six from the State of Pennsylvania; the next largest number of original purchasers by state of residence is four from the State of Colorado. One of the representative plaintiffs, Paul Danzig, is a resident of the County of Alameda, State of California.

71. All of the California residents who are members of the plaintiff class were solicited to purchase their respective partnership interests within the State of California; and each such California resident executed his or her subscription agreement within the State of California.

72. All limited partners in GGR are members of the plaintiff class; the membership of the class was at all times clearly ascertainable.

73. The claims of the representative plaintiffs in this action are typical of the claims of all members of the plaintiff class. The representative plaintiffs adequately represented the members of the plaintiff class in this action.

74. The issues of law and fact upon which this action is based are common to all members of the class; there is a well defined community of interest among members of the class in the issues of law and fact adjudicated in this action.

75. After commencement of the within action, certain members of the plaintiff class entered into agreements (Tr. Exs. 391) with defendants Jack Grynberg & Associates and Jack Grynberg for the purpose of drilling three wells on leases in the Dragon Trail Prospect, which said leases were among

the leases in dispute in this action; the wells drilled under those agreements are commonly referred to as Wells number 24-6, 44-6 and 44-29. Said agreements were approved by Orders of this Court. Pursuant to the provisions of those agreements, the members of the plaintiff class who entered into the said agreements did not thereby waive any right or claim to which said persons were entitled in this action.

76. Each participant in the drilling of the subject wells, other than defendants Jack Grynberg and Jack Grynberg & Associates, was required to pay a pro rata share of one-half of the expenses up to a total cost of $170,000.

77. The names of the limited partners who agreed to participate in the drilling of Well 24-6 are set forth on Exhibit F, Column 1; the percentage of the limited partners' 50% share of costs up to $170,000 of well 24-6 to which each such participant subscribed is set forth in Exhibit F, Column 2; the amount paid by each limited partner participant in well 24-6 as of December 31, 1979 is set forth on Exhibit F, column 3, which said exhibit is hereby incorporated herein by this reference.

78. The names of the limited partners who agreed to participate in the drilling of Well 44-6 are set forth on Exhibit G, Column 1; the percentage of the limited partners' 50% share of costs of well 44-6 to which each such participant subscribed is set forth in Exhibit G, Column 2; the amount paid by each participant in well 44-6 as of December 31, 1979 is set forth on Exhibit G, column 3, which said exhibit is hereby incorporated herein by this reference.

79. The names of the limited partners who agreed to participate in the drilling of Well 44-29 are set forth on Exhibit H, Column 1; the percentage of the limited partners' 50% share of costs of well 44-29 to which each such participant subscribed is set forth in Exhibit H, Column 2; the amount paid by each participant in well 44-29 as of December 31, 1979 is set forth on Exhibit H, column 3, which said exhibit is hereby incorporated herein by this reference.

80. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 24-6 are set forth on Exhibit J, which said exhibit is hereby incorporated herein by this reference.

81. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 44-6 are set forth on Exhibit K, which said exhibit is hereby incorporated herein by this reference.

82. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 44-29 are set forth on Exhibit L, which said exhibit is hereby incorporated herein by this reference.

83. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 24-6, are set forth on Exhibit M, which said exhibit is hereby incorporated herein by this reference.

84. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 44-6, are set forth on Exhibit N, which said exhibit is hereby incorporated herein by this reference.

85. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 44-29, are set forth on Exhibit O, which said exhibit is hereby incorporated herein by this reference.

86. The total cost of drilling well 24-6, based on the invoices approved for payment by defendant Jack Grynberg

& Associates, with the exception of a charge of $2,304 for Jack Grynberg's time, which is not properly chargeable, was $217,917.44.

87. The total amount to be paid by each member of the plaintiff class who agreed to participate in well 24-6 as his pro rata share of $170,000 is set forth in Exhibit I, Column 2, which said exhibit is hereby incorporated herein by this reference.

88. The total costs of drilling well 44-6, based on the invoices approved for payment by defendant Jack Grynberg & Associates, with the exception of a charge of $2,304 for Jack Grynberg's time, which is not properly chargeable, is $132,146.16.

89. The amount payable by each member of the plaintiff class who agreed to participate in well 44-6 as his pro rata share of $132,146.16 is set forth in Exhibit I, Column 3, which said exhibit is hereby incorporated herein by this reference.

90. The total cost of drilling well 44-29 based on invoices approved for payment by defendant Jack Grynberg & Associates, less $2,304 for Jack Grynberg's time which is not properly chargeable, is $113,752.39.

91. The total contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow for drilling well 24-6 was 54.006% of costs up to $170,000, and all costs over $170,000, which said sum is set forth on Exhibit I, column 2, which said exhibit is hereby incorporated herein by this reference.

92. The contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow account for drilling well 44-6 is 52.851% of total costs, which said sum is set forth on Exhibit I, column 3, which said exhibit is hereby incorporated herein by this reference.

93. The contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow for drilling well 44-29 is 52.5% of total costs.

94. Defendants Jack Grynberg & Associates and Jack Grynberg have contributed $65,000 to the escrow for drilling well 24-6; defendants Jack Grynberg & Associates and Jack Grynberg have contributed $30,000 to the escrow for drilling well 44-6; defendants Jack Grynberg & Associates and Jack Grynberg have contributed $68,251 to the escrow for drilling well 44-29.

95. The escrow agents are entitled to collect the sums due from the participants in wells 24-6 and 44-6 as set forth in Exhibit I, columns 2 and 3, less amounts previously paid, and pay from the escrow accounts for those wells the accounts payable set forth in Exhibits I, J, K and M, which said exhibits are hereby incorporated herein by this reference.

96. The escrow agents are entitled to pay the accounts payable for well 44-29 set forth on Exhibits L and O and refund any funds remaining in the escrow account to the participants, in proportion to their participation in the escrow, as set forth in Findings 79 and 93.

97. If any Finding of Fact set forth herein is determined to be a Conclusion of Law rather than a Finding of Fact, then it shall be deemed to be a Conclusion of Law.

Conclusions of Law

1. The within action is a proper class action on behalf of the plaintiffs; the plaintiff class constitutes a proper and appropriate class.

2. This Court has jurisdiction over each of the defendants herein and over the subject matter of the within action.

3. The GGR prospectus was part of the GGR partnership agreement.

4. The final GGR prospectus and partnership agreement are ambiguous with regard to the contribution to be made by the defendants to the partnership.

5. Defendants made common, material, and fraudulent misrepresentations and nondisclosures to all members of the plaintiff class with the intention of inducing them to subscribe to limited partnership interests in GGR and to make contributions of capital to GGR. Each member of the plaintiff class justifiably relied on such misrepresentations and nondisclosures in purchasing their respective interests in GGR and making their respective contributions to capital of GGR.

6. The members of the plaintiff class were induced to enter into their respective purchases of limited partnership interests in GGR and to make their respective contributions to capital of GGR as a direct and proximate result of common fraudulent misrepresentations and nondisclosures of the defendants.

7. The members of the plaintiff class were entitled to rescind their respective agreements to purchase limited partnership interests in GGR.

8. As a direct and proximate result of each of the fraudulent misrepresentations of defendants, and each of them, the members of the plaintiff class were damaged in the amounts paid by each said member, respectively, as capital payments to or for the subject partnership in the total sum of $4,109,198.39; the damage so suffered by each member of the class is set forth on Exhibit E, column 1, which said exhibit is hereby incorporated herein by this reference.

9. As a further direct and proximate result of each of the fraudulent misrepresentations and nondisclosures of defendants, and each of them, the members of the plaintiff class suffered additional compensatory damages in the sum of $2,202,714.47; damages so suffered by each member of the plaintiff class is set forth on Exhibit E, column 2, which said exhibit is incorporated herein by this reference.

10. The members of the plaintiff class are each entitled to payment from the defendants of the sums paid by each member of the plaintiff class as their respective contributions to the capital of GGR as set forth on Exhibit D, column 1,

which said exhibit is hereby incorporated herein by this reference.

11. Defendants are entitled to restoration from the members of the plaintiff class, as an offset against the sums payable by defendants to said plaintiffs as set forth in Conclusion No. 10, of the sums distributed to said plaintiffs from GGR, as set forth on Exhibit D, column 2, which said exhibit is hereby incorporated herein by this reference.

12. The members of the plaintiff class are each entitled to judgment against defendants for the sums set forth in Exhibit E, column 1, which said exhibit is hereby incorporated herein by this reference.

13. Each member of the plaintiff class is entitled to judgment for additional damages against defendants in the sums set forth on Exhibit E, column 2, which said exhibit is hereby incorporated herein by this reference.

14. The acts and conduct of defendant Jack Grynberg in inducing the members of the plaintiff class to purchase limited partnership interests in GGR were fraudulent, intentional and malicious.

15. Each member of the plaintiff class is entitled to recover punitive or exemplary damages from defendant Jack Grynberg in the sum set forth on Exhibit E, column 3, which said exhibit is hereby incorporated herein by this reference.

16. The members of the plaintiff class are not indebted to defendants, or any of them, for any sums arising out of the GGR partnership.

17. Defendants are entitled to all assets and property of GGR.

18. The members of the plaintiff class did not affirm the partnership contract after acquiring knowledge of the facts constituting the basis for rescission of said agreement.

19. The members of the plaintiff class, individually and collectively, were not guilty or laches in their assertion of

their claim for fraud nor in their assertion of their claim to rescind the partnership agreement.

20. The members of the plaintiff class, individually and collectively, are not estopped from asserting their claim to rescission and damages in the within action.

21. The members of the plaintiff class, individually and collectively, did not waive their rights to claim rescission and damages in the within action.

22. The members of the plaintiff class, individually and collectively, did not have unclean hands with regard to the transactions involved in the within action.

23. The members of the plaintiff class, individually and collectively, were not negligent in their conduct in entering into their respective subscription agreements, or in relying upon the representations and nondisclosures of the defendants with regard thereto.

24. California has a strong governmental interest in applying its law to the facts of the instant case.

25. No governmental interest of the State of Colorado will be impaired by applying California rather than Colorado law to the issues or remedies herein; there is a lesser impairment of the governmental policy of the State of Colorado if the law of California is applied to the issues or remedies of the within action than the impairment to California governmental policy if the law of Colorado were applied.

26. No other state has a strong governmental interest which would be impaired by the application of California law to the issues of the within action.

27. California law is the proper law to be applied to the issues of the within action.

28. Those limited partners who participated in the agreements for the drilling of wells 24-6, 44-6 and 44-29, as set forth on Exhibit I hereto, are obligated to pay to the escrow holders for said wells the total sums set forth on Exhibit I,

columns 2 and 3 to the extent not already paid, which said exhibit is hereby incorporated herein by this reference.

29. Defendants Jack Grynberg and Jack Grynberg and Associates are obligated to pay to the said escrow holders the sums set forth on Exhibit I, columns 2 and 3, to the extent not already paid, which said exhibit is hereby incorporated herein by this reference.

30. The escrow holders shall pay all obligations listed on Exhibits J, K, L, M, N and O upon receipt of the funds from all escrow participants as aforesaid, which said exhibits are hereby incorporated herein by this reference. Defendants Jack Grynberg and Jack Grynberg & Associates are solely liable for any and all other debts or expenses chargeable to or arising from the drilling of wells 24-6, 44-6 and 44-29.

31. Defendants Jack Grynberg and Jack Grynberg & Associates are solely liable for any costs of drilling any of wells 24-6, 44-6 and 44-29 in excess of those set forth in Findings 86, 88 and 90.

32. If any Conclusion of Law set forth herein is determined to be a Finding of Fact rather than a Conclusion of Law, then it shall be deemed to be a Finding of Fact.

Dated: December 18, 1980

/s/ SPURGEON AVAKIAN

JUDGE OF THE SUPERIOR COURT

EXHIBIT A

PLAINTIFF CLASS

NAME	CITY AND STATE
Sam Barshop	San Antonio, TX
BBL Associates	Chicago, IL
R. Stephen Berry	Chicago, IL
Alexander Brodsky, M.D.	Houston, TX
Thomas Burke, Jr.	Houston, TX
Francis Cannon (Assignee)	Fort Washington, PA
D. A. Casey	Cheswick, PA
Harvey M. Cohen, M.D.	Denver, CO
Wayne L. Conner, M.D.	Denver, CO
Paul Danzig (Denver Properties)	Oakland, CA
Louis Degen	Denver, CO
Richard S. Dinner	San Francisco, CA
Ernie Foreman, M.D.	Denver, CO
Joshua Freedman (Assignee)	Fort Washington, PA
Charles Friedman	Paradise Valley, AZ
N. J. Friedman	San Francisco, CA
Frances Geballe	Woodside, CA
Theodore Geballe	Woodside, CA
Alfred C. Glassell, Jr.	Houston, TX
Emmanuel Goldberg	Rochester, NY
Estate of H. J. Goldenberg	Minneapolis, MN
Rhoda H. Goldman	San Francisco, CA
Richard N. Goldman	San Francisco, CA
Jerome J. Goldstein	Denver, CO
Greater Miami Jewish Welfare Federation	Miami, FL
Evelyn Green	New York, NY
Estate of Mayer Greenberg	Beverly Hills, CA
Peter Haas	San Francisco, CA
Robert M. Hecht	Houston, TX
Lewis Heicklen (Assignee)	Philadelphia, PA
Estate of Louis Honig	San Francisco, CA
Joseph Kanter	Miami, FL
Lucien Katzenberg	Jenkintown, PA

NAME	CITY AND STATE
John W. Kelsey	Houston, TX
Mavis P. Kelsey	Houston, TX
Daniel E. Koshland, Jr.	San Francisco, CA
Walter Landor	San Francisco, CA
Richard Lansburgh	Baltimore, MD
Sidney Lansburgh, Jr.	Baltimore, MD
Frank R. Lautenberg	Clifton, NJ
Walter Leventhal (Assignee)	Philadelphia, PA
Ann K. Lenway	San Francisco, CA
Hannah Levy	Denver, CO
Martin J. Lichterman, Sr.	Memphis, TN
Lawrence J. Muller	Hewlett, NY
Margot Parke	Chicago, IL
Madeline H. Russell	San Francisco, CA
Robert Russell	Miami, FL
Peter J. Scott	South Orange, NJ
Philip S. Seltzer	Fort Washington, PA
Louis Stein	Philadelphia, PA
Ivan G. Straus	Chicago, IL
Richard Swig	San Francisco, CA
Martin Walsh	Media, PA
Pauline C. Walsh	Media, PA
Sidney Weinstein, M.D.	West Orange, NJ
C. H. Wilkins	San Francisco, CA
Arnold H. Zidell	San Francisco, CA
Carl Zwerner	Hollywood, FL

Superior Court, State of California

FOR THE COUNTY OF ALAMEDA

PAUL DANZIG, LOUIS DEGEN, HAROLD J. GOLDENBERG, ROBERT RUSSELL, AND CARL R. ZWERNER, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

vs.

NO. 462 022-4

JACK GRYNBERG & ASSOCIATES, A SOLE PROPRIETORSHIP, JACK GRYNBERG, CELESTE GRYNBERG, FIRST DOE THROUGH FIFTIETH DOE, INCLUSIVE,

Defendants.

MODIFICATION OF JUDGMENT
(C.C.P. §662)

Trial of the within action commenced on February 14, 1980, before the Honorable Spurgeon Avakian presiding without a jury, the parties having waived trial by jury and stipulated to trial by the Court. Bancroft, Avery & McAlister by Sandra J. Shapiro and Janet Friedman appeared as attorneys for the plaintiff class and Fishman & Geman by William Fishman, Neil Ayervais and Haas & Pahlmeyer by Jason Pahlmeyer appeared as attorneys for defendants. Oral and documentary evidence was introduced, trial briefs were filed and the matter was submitted. The Court entered its Findings of Fact and Conclusions of Law on December 18, 1980

and, further, has entered additional Findings of Fact and Conclusions of Law pursuant to C.C.P. §662; and

A motion having been made pursuant to §662 of the Code of Civil Procedure of the State of California to modify the judgment previously entered by this Court, and the Court having determined to modify the judgment heretofore entered in this action:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The agreements of subscription for purchase of limited partnership interests in that certain partnership known as the Greater Green River Basin Drilling Program 72-73 executed by each member of the plaintiff class herein, which said plaintiffs are listed on Exhibit A attached hereto and hereby incorporated herein by this reference, were legally rescinded by each said member of the plaintiff class and are of no further force and effect between the members of the plaintiff class and defendants herein, or any other parties.

2. That defendant Jack Grynberg & Associates shall restore to the plaintiff class the sum of $4,109,198.39; the sum which said defendant Jack Grynberg & Associates shall restore to each member of the plaintiff class is set forth on Exhibit B, column 1, which said exhibit is hereby incorporated herein by this reference.

3. That defendants Jack Grynberg and Celeste Grynberg, and each of them, shall pay to the plaintiff class as damages the sum of $4,109,198.39; the sum which said defendants Jack Grynberg and Celeste Grynberg, jointly and severally, shall pay to each member of the plaintiff class is set forth on Exhibit B, column 1, which said exhibit is hereby incorporated herein by this reference.

4. That defendants Jack Grynberg & Associates, Jack Grynberg and Celeste Grynberg, and each of them, shall pay to the plaintiff class as additional damages the sum of $2,202,714.47; the sum which said defendants Jack Grynberg

& Associates and Jack Grynberg, and each of them, jointly and severally, shall pay to each member of the plaintiff class as such damages is set forth on Exhibit B, column 2, which said exhibit is hereby incorporated herein by this reference.

5. That defendant Jack Grynberg, only, shall pay to the plaintiff class as punitive damages the sum of $431,081.06; the sum which defendant Jack Grynberg shall pay to each member of the plaintiff class as such punitive damages is set forth on Exhibit B, column 3, which said exhibit is hereby incorporated herein by this reference.

6. That the members of the plaintiff class listed on Exhibit C hereto pay to Louis Degen and Peter Scott as escrow holders for the Dragon Trail wells 24-6, 44-6 and 44-29, the sums set forth on Exhibit C, columns 2 and 3 to the extent not already paid; that defendant Jack Grynberg & Associates pay to said escrow holders the sums set forth on Exhibit C, columns 2 and 3, which said exhibit is hereby incorporated herein by this reference; that the said escrow holders pay the obligations listed on Exhibits D, E, F, G, H and I (which said exhibits are attached hereto and incorporated herein by this reference) upon receipt of said funds; that said escrow holders pay any sums remaining in the escrow account for well 44-29 after payment of the obligations listed on Exhibits H and I to the participants in said escrow in proportion to their interest therein; and that defendant Jack Grynberg & Associates pay any and all other costs or expenses arising from wells 24-6, 44-6 and 44-29.

7. That the plaintiff class recover from defendants Jack Grynberg & Associates, Jack Grynberg and Celeste Grynberg, and each of them, its taxable costs of suit herein.

IT IS FURTHER ORDERED that this modified Judgment shall be entered and effective *nunc pro tunc* as of the date of entry of the original Judgment, to wit: December 22, 1980.

Dated: February 4, 1981.

/s/ SPURGEON AVAKIAN

JUDGE OF THE SUPERIOR COURT

Superior Court of the State of California

COUNTY OF ALAMEDA

PAUL DANZIG, LOUIS DEGEN, HAROLD J. GOLDENBERG, ROBERT RUSSELL, AND CARL ZWERNER, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

vs.

No. 462022-4

JACK GRYNBERG AND ASSOCIATES, A SOLE PROPRIETORSHIP, JACK GRYNBERG, CELESTE GRYNBERG, FIRST DOE THROUGH FIFTIETH DOE, INCLUSIVE,

Defendants.

NOTICE OF CLASS ACTION

To: All limited partners of Greater Green River Basin Drilling Program 72-73, a limited partnership:

YOU ARE HEREBY NOTIFIED that the plaintiffs in the above-captioned matter have filed an action in the Superior Court of the State of California, County of Alameda, against Jack Grynberg and Associates, a sole proprietorship, and Jack Grynberg and Celeste Grynberg, individually, in which said plaintiffs assert various claims on behalf of the limited partners of Greater Green River Basin Drilling Program 72-73, a limited partnership.

The action alleges, among other things:

1. That the amendment to the partnership agreement of said partnership adopted in or about September, 1974, and any contribution of additional capital made by limited partners subsequent to adoption of that amendment were invalid and in violation of the original partnership agreement; and that said sums should therefore be reimbursed to the limited partners entitled thereto.

2. That consent to the subject amendment and contribution of additional capital by various limited partners was induced by fraudulent misrepresentations and nondisclosures. Plaintiffs therefore seek rescission of the amendment, restoration of the sums paid pursuant thereto and reallocation of the respective interests of the limited partners in the income, if any, from the wells in question to their pro-rata interests prior to the adoption of the amendment.

3. That those limited partners who contributed additional capital to the partnership under the subject amendment are entitled to repayment of those sums.

4. That various oil and gas leases standing in the names of defendants Jack and Celeste Grynberg, together with all income and profits therefrom, constitute assets of the partnership and should be conveyed to the partnership. Plaintiffs also seek actual and punitive damages on behalf of the limited partnership.

5. That there is a dispute between the general partner and the limited partners as to their respective rights and interests in the assets of the partnership upon termination, and plaintiffs seek a judicial declaration as to the respective rights and interests of the general and limited partners in the assets of the partnership upon termination of the partnership.

6. That the general partner has breached its contractual and fiduciary duties to the limited partners in its conduct of the partnership including, among other things, the alloca-

tion of assets, income and expenses between the general and limited partners. Plaintiffs seek an accounting and general and punitive damages on behalf of the limited partners.

The defendants have filed answers in this action in which they deny all of the material allegations of the complaint and have denied any liability.

On February 3, 1976, this Court determined that this action should proceed as a class action on behalf of all persons who are limited partners of Greater Green River Basin Drilling Program 72-73. This Court further determined that the plaintiffs named in the action are proper representatives and may proceed with this action on behalf of the class.

NOW, THEREFORE, TAKE NOTICE:

1. All limited partners of Greater Green River Basin Drilling Program 72-73 will be bound by any judgment entered in this action as to the following issues alleged:

(a) The validity or invalidity of the amendment to the partnership agreement adopted in or about September, 1974.

(b) Whether there should be rescission of the subject amendment on the grounds of alleged misrepresentations and/or nondisclosures in the inducement of the adoption of that amendment.

(c) The rights, if any, of the partnership to certain oil and gas leases standing in the names of Jack and/or Celeste Grynberg.

(d) The respective rights and interests of the limited partners as a group in the assets of the partnership upon termination thereof.

(e) The proper allocation of assets, income and expenses of the partnership between the general and limited partners by virtue of the acts alleged; and the right of the partnership, if any, to actual and punitive damages

from the defendants by virtue of the acts alleged in the Complaint.

The determination of these issues will determine rights of the class as a group. You will be entitled to share pro-rata, after deduction for attorneys' fees and disbursements, in any recovery in favor of the class; you will also be bound by any judgment adverse to the class on these issues, or any of them.

If you prefer to be represented by your own counsel with regard to the matters enumerated in paragraph 1 above, whether you favor or oppose the relief sought, or for any other reason, you may enter an appearance in this action through your counsel not later than April 5, 1976. If such appearance is not entered by that date, then your interests as a member of the class which consists of the limited partners of Greater Green River Basin Drilling Program 72-73, will be represented by the plaintiffs in this action and their counsel.

2. You may elect to be excluded from the class with regard to those causes of action (only) which seek repayment of the additional capital paid by various limited partners pursuant to the amendment of September, 1974 (that is, the Third and Fourth Causes of Action only). If you elect to be excluded from the class as to these causes of action, you will be free to pursue on your own behalf whatever legal rights you may have with regard to these issues.

(a) The Court will exclude you from the class as to these causes of action, only, *if* you request exclusion in writing, postmarked on or before March 30, 1976. Persons who request exclusion will not be entitled to share in the benefits of any judgment rendered on these causes of action (only) if that judgment is favorable to plaintiffs, and will not be bound by any judgment rendered on these causes of action (only) if it is adverse to plaintiffs.

Requests for exclusion must be sent, in the form attached, to:

Clerk of the Superior Court of
the County of Alameda
1225 Fallon Street
Oakland, CA 94612

(b) If you elect to participate in the class you may be represented either by the plaintiffs herein and their counsel of record or by your own counsel if you prefer; if you elect to be represented by your own counsel, you must enter an appearance through such counsel not later than April 5, 1976.

(c) If you do not file an intention to exclude yourself from the class on these causes of action and do not enter an appearance through counsel of your own choosing by the dates set forth, your interests in these causes of action will be represented by the plaintiffs and their counsel.

(d) If you elect to participate in the class with regard to these causes of action, you will be entitled to share pro rata, after deduction for attorneys' fees and disbursements, in any recovery in favor of the class. You will also be bound by any judgment adverse to the class.

3. This notice is not to be understood as an expression of any opinion by this Court as to the merits of the claims or defenses asserted by either side in this litigation.

/s/ GEORGE W. PHILLIPS, JR.

JUDGE OF THE SUPERIOR COURT

Superior Court of the State of California
COUNTY OF ALAMEDA

PAUL DANZIG, LOUIS DEGEN, HAROLD J. GOLDENBERG, ROBERT RUSSELL, AND CARL ZWEIGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

vs.

No. 462022-6

JACK GRYNBERG AND ASSOCIATES, A SOLE PROPRIETORSHIP, JACK GRYNBERG, CELESTE GRYNBERG, FIRST DOE THROUGH FIFTIETH DOE, INCLUSIVE,

Defendants.

REQUEST TO BE EXCLUDED FROM THE CLASS

To: The Clerk of the Superior Court of the County of Alameda, State of California:

Please take notice that _____
(Print Name)
_____ elects to be excluded
(Print Address)
from the class in the above-captioned matter with regard to the Third and Fourth Causes of Action alleged.

_____
(Signature)

Geographic Distribution of Purchasers of GGRB Interests

State	Investors	Amount/Percent	
California	16	$ 875,000	(21.88%)
Colorado	4	250,000	(6.25%)
Connecticut	1	25,000	(.62%)
Florida	3	400,000	(10%)
Illinois	5	125,000	(3.13%)
Maryland	2	25,000	(.62%)
Minnesota	1	50,000	(1.25%)
New Jersey	3	450,000	(11.25%)
New York	3	350,000	(8.75%)
Oregon	1	50,000	(1.25%)
Pennsylvania	11	850,000	(21.25%)
Tennessee	1	50,000	(1.25%)
Texas	7	500,000	(12.5%)
	58	$4,000,000	(100.0%)

Office-Supreme Court, U.S.
FILED
JUN 13 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1784

In The
Supreme Court of the United States
October Term, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, and CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, and CARL ZWERNER,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

SANDRA J. SHAPIRO
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601 Montgomery Street
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San Francisco, California 94111
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Counsel for Respondents

June 13, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition omits several critical substantive and procedural facts which are material to the issues raised before this Court. Specifically, the Petition does not set forth that Petitioners failed to raise *any* of the issues raised before this Court before the trial court prior to trial and adverse judgment.

Petitioners Jack and Celeste Grynberg and Jack Grynberg & Associates ("Grynbergs"), defendants in the action, seek reversal of a judgment rendered in favor of the plaintiff class by the trial court sitting without jury. The action was based upon the alleged fraudulent acts of Grynbergs in soliciting the members of the plaintiff class to subscribe to a prospective oil and gas drilling program known as the Greater Green River Basin Drilling Program 72-73 ("GGRB"), and to participate in a subsequent additional "assessment." The trial court found that Grynbergs committed acts of intentional fraud, through the use of common written misrepresentations disseminated to all members of the class, to induce the purchases of limited partnership interests in GGRB. The court ordered rescission of the partnership subscriptions executed by the members of the class and restitution of all sums paid as initial subscriptions and pursuant to a subsequent assessment levied under a purported amendment to the agreement, together with compensatory damages, against all defendants. The court further awarded punitive damages against Jack Grynberg (only), in the sum of $431,081.06, *pro rata* to the members of the class.

GGRB was formed in 1971 as an oil and gas drilling program. Jack Grynberg acted as general partner through

Jack Grynberg & Associates, a sole proprietorship. Limited partnership interests were sold in several states. The program was registered in the State of California. Grynberg sold more interests in the State of California than in any other state: Seventeen of the original 52 purchasers of interests, or 32%, were residents of the State of California[1] (F.F.[2] No. 69-70 and Exhibit A to the judgment; Ap.[3] pp. A32, A41-42); the next largest number of original purchasers by state of residence was six from Pennsylvania and Texas and four from Colorado. (F.F. No. 69, 70; Ap. pp. A32, A41-42.)

In March, 1975, five[4] individuals filed the subject action on their own behalf and on behalf of all limited partners of GGRB. The crux of the action was the contribution to be made to the partnership by Grynbergs. Under the terms of the partnership agreement, the limited partners contributed $4,000,000 as the capitalization of the partnership and received an undivided 50% interest in the partnership and in the assets thereof, *pro rata* upon termination of the partnership. Grynbergs received the remaining 50% interest.

The plaintiff class contended, *inter alia*, that Grynbergs had represented that they would contribute to the partnership, as their capital contribution, approximately

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[1] The numbers of purchasers per state set forth in the Petition do not coincide with the findings made by the trial court.

[2] Findings of Fact of the trial court will be cited as "F.F."

[3] The Appendix to Grynbergs' Petition for Certiorari will be cited as "Ap. p. A—."

[4] One of the representative plaintiffs died prior to trial and his estate was substituted as a member of the class. Another representative plaintiff, Robert Russell, died during the appeal process.

200,000 acres of oil and gas leases owned by Jack and Celeste Grynberg, individually, and that upon termination of the partnership (defined as expenditure of the entire monetary capital), those leases would be distributed to the partners, *pro rata*, so that the limited partners would continue to hold a 50% undivided interest. However, upon termination of GGRB, Grynbergs asserted that the limited partners had a continuing interest only in the few leases which had been drilled and were producing; they asserted that all of the other leases (which had been maintained at the expense of the partnership during its term) reverted to them free of any claim of the partnership or the limited partners. The plaintiff class therefore sought, *inter alia*, a determination that the subject leases were assets of the partnership and did not revert to the Grynbergs, and that the limited partners held a continuing 50% interest in the leases. The plaintiff class also sought damages for various breaches of fiduciary duty by Grynbergs, as well as for their misrepresentations that the leases would remain assets of the partnership and would not revert to them upon termination of the partnership. The plaintiff class also sought rescission of the 1974 assessment levied pursuant to a purported amendment to the partnership agreement, under which various limited partners had contributed an additional $410,810.69; or, alternatively, damages in the amount of those contributions.

Grynbergs filed preliminary motions in which Celeste Grynberg challenged the jurisdiction of the California courts *as to her*, and Grynbergs collectively sought dismissal of the action on the grounds of inconvenient forum. Both motions were denied, and the appellate court denied petitions for writs of mandate. All defendants then answered.

No defendant raised any claim or contention that the California courts lacked jurisdiction over any member of the class by answer, or otherwise, in the trial court.

In December, 1975, the representative plaintiffs moved for class certification. Grynbergs' response to the motion raised no jurisdictional objection. After hearing, the trial court ordered the action certified as a class action on all causes of action. Notice in the form approved by the court was mailed to all members of the class; each member of the class was expressly notified of the right to "opt out" of the action. Grynbergs raised no objection to the form of the notice. No member of the class elected to opt out. From that point forward, the suit proceeded as a class action.

During the course of discovery, Grynbergs submitted interrogatories directed to all of the unnamed class members. *Each member of the class filed verified answers to those interrogatories prior to trial.*

In October, 1979, the plaintiff class moved to amend the complaint to add additional causes of action by which the class sought rescission of the original partnership subscriptions or damages in the amount of the original subscription payments, based upon the common material fraudulent misrepresentations and non-disclosures of Grynbergs. The amendment was sought, among other reasons, because Grynbergs had been managing and operating the disputed leases solely for their own account and benefit for over five years since the termination of the partnership; they had therefore obtained the income and benefits from many of the leases and had abandoned or permitted termination of many others, so that allocation of an interest in those leases to the limited partners

would have been a useless act. The proposed causes of action were based entirely upon the facts previously alleged in the complaint, and merely sought alternative forms of relief. The trial court permitted the amendment, ruling that it presented no new factual or legal issue. Grynbergs filed their answer to the amendment; they again failed to raise any defense or objection with regard to the jurisdiction of the court over the class members or the nature or form of the notice which had been sent to the members of the class. Grynbergs did not seek to decertify or recertify the class based upon the amendment.

The action proceeded to trial in March, 1980, *as a class action* without objection by Grynbergs; they raised no claim that the amendment had in any way impaired or affected the original class certification or notice to the class, nor did they contend that the original notice had been rendered inadequate or insufficient because of the amendment.

Nor did Grynbergs raise any issue before the trial court that the law of the states of residence of the respective class members was the proper choice of law to be applied. The only choice of law urged by Grynbergs before the trial court was that the law of the State of Colorado, as *their* place of residence, rather than that of California, should be applied. That choice of law issue was argued in pre-trial briefs, and the substantive issues were argued by all parties under both California and Colorado law in the extensive post-trial briefs. No other choice of law issue was submitted to the trial court.

In September, 1980, the trial court issued his notice of intended decision. The trial court found, among other

matters, that Jack Grynberg had distributed a series of lengthy and complex prospectuses of identical appearance to the members of the class without disclosing to them that material changes had been made in the paragraph relating to the contribution of the leases by the Grynbergs to the partnership after distribution of the original prospectus, and then had distributed written summaries with the final versions of the prospectus which intentionally repeated the language of the *original* prospectus (in large, capitalized letters) that the leases would be contributed to the partnership, despite the fact that Grynbergs had been instructed by the SEC to delete that language from the prospectus because it was "misleading" and would cause the investors to believe that the leases were to become assets of the partnership which would not revert to Grynbergs upon termination. The court ordered rescission of the partnership subscriptions as well as of the assessments made under the purported amendment to the agreement and restoration of all sums paid by each member of the class, together with compensatory and punitive damages. Findings of fact and conclusions of law were submitted, argued and filed, and judgment was entered on December 18, 1980. A modification of judgment was entered *nunc pro tunc* on February 5, 1981, for the sole purpose of curing the inadvertent omission of Celeste Grynberg's name from the caption of the judgment form.

After entry of judgment, Grynbergs filed motions for new trial.[5] *Those motions raised the claims of inadequate*

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[5] Grynbergs state that their motion for new trial was filed prior to the *Modification* of judgment, and thus "timely" raised the choice of law and notice issues, implying that the Modifi-

(Continued on following page)

notice to the class and failure to apply the law of the states of residence of the individual class members for the first time.[6] The trial court denied the motions on all grounds. Grynbergs then filed their notice of appeal, and the parties filed their respective briefs on appeal. *Several months after the appellate briefs had been filed,* Grynbergs filed a motion before the appellate court to dismiss the action as to the non-resident class members, *contending for the first time that the California courts did not have jurisdiction over the non-resident class members.* The Court of Appeal denied the motion without opinion and without prejudice to reconsideration of the issue when the appeal in chief was heard. After oral argument, the Court of Appeal affirmed the judgment of the trial court; it did not reconsider the jurisdictional motion. The California Supreme Court denied a petition for hearing on all grounds.

After judgment was entered in California, the judgment was duly established in Colorado and Wyoming, and

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(Continued from previous page)

cation had a substantive effect upon the judgment. But even if, *arguendo,* such issues could properly be raised after trial and announcement of decision but prior to entry of judgment, judgment had been entered in this action prior to filing the motions for new trial; such motions are not made under California procedure until after judgment has been formally entered. The Modification of the judgment, which was entered *nunc pro tunc,* was merely technical in nature to cure the inadvertent omission of Celeste Grynberg's name from the caption of the action, although the body of the judgment recited the liability of all defendants. The Modification was requested when the clerk of the Colorado court refused to issue execution against Celeste after the subject judgment was established in Colorado because her name was not contained in the caption.

[6] Although Grynbergs' post-trial brief was 208 pages, neither these issues, nor the issue of jurisdiction, was raised.

execution issued against Grynbergs since they failed to file an appeal bond. Grynbergs then filed a Chapter XI proceeding in the Bankruptcy Court in Denver, Colorado. Each member of the class, individually, filed a verified proof of claim in that bankruptcy with regard to each person's interest in the judgment.

I.

THERE IS NO BASIS FOR GRANTING THE WRIT IN THIS ACTION

1. The within action does not present constitutional questions relating to jurisdiction, nor does it present issues similar to those raised in *Phillips Petroleum Co. v. Shutts.*

a. Grynbergs did not timely raise the jurisdictional issue. The issue may not be raised for the first time on appeal.

b. Each of the class members filed verified answers to interrogatories prior to trial, thereby voluntarily subjecting themselves to the jurisdiction of the California courts.

c. Each of the class members acknowledged and ratified the judgment after it was entered, and prior to Grynbergs' motion to dismiss.

2. Grynbergs failed to raise any claim that the law of the states of residence of the class members should be applied to the claims of those class members prior to judgment; the claim, even if meritorious, was therefore waived.

3. Grynbergs failed to assert any objection to the content of the notice sent to the members of the class prior

to judgment; the claim, even if meritorious, was therefore waived.

II.

THE SUBJECT ACTION DOES NOT RAISE ISSUES SIMILAR TO PHILLIPS PETROLEUM CO. V. SHUTTS; THERE WAS NO DENIAL OF DUE PROCESS TO THE NON-RESIDENT CLASS MEMBERS

A.

Grynbergs Did Not Timely Raise The Jurisdictional Issue Before The Trial Court

Even if there be an issue as to the right of a state court to assert jurisdiction over non-resident class plaintiffs, the defendant must timely raise the objection before the trial court. The issue must be raised at the first opportunity, generally in the defendant's first motion or responsive pleading. (*Insurance Corp. v. Compagnie Des Bauxites* (1981) 456 U.S. 694, 704; *cf.* F.R.C.P. 12(h) (1).) As Mr. Miller, one of the counsel for Grynbergs on the Petition, stated to this Court during oral argument in *Phillips Petroleum Co. v. Shutts*:

> "We were obliged under the normal rules of assertion of threshold defenses to make the jurisdictional objection prior to answer and litigate it, as we did, in a fully adversarial context." (O.T.[7] p. 9.)

In *Phillips Petroleum Co.*, the defendants did raise the jurisdictional issue at the procedural stage and also sought interim appellate review. They fully litigated the issue before the trial court. Grynbergs failed to meet

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[7] The Official Transcript of Proceedings, *Phillips Petroleum Co. v. Shutts*, Docket No. 84-233, oral argument on February 25, 1985, will be cited "O.T."

that obligation; they failed to either raise the defense of lack of jurisdiction or to litigate it before the trial court. They thus precluded the members of the plaintiff class from responding, or from taking any action to meet the issue. It is not unreasonable to suggest that had the members of the plaintiff class been asked to affirmatively opt in rather than being given the opportunity to opt out, or had they been asked to take any other specific action to acknowledge the jurisdiction of the California courts, they would have done so; each class member responded to interrogatories submitted by defendants, which required more effort and more commitment to the lawsuit than would the submission of an opt-in form to the court. But no such demand or objection was made by Grynbergs prior to judgment. The action of defendants in withholding the jurisdictional claim prior to trial and judgment precluded the members of the class from taking whatever action defendants contended should have been taken by them.

If a defendant does have standing to contest the jurisdiction of the forum over members of the plaintiff class, that standing should no longer exist after trial on the merits. The claim of a defendant that members of the plaintiff class have been denied due process rings very hollow after a judgment has been rendered in favor of the class, and the members of the class seek the benefits of that judgment. The due process right which Grynbergs seek to assert is concededly that *of the class members.* Since it is their right alone, *they* have the right to waive it. (*Insurance Corp. v. Compagnie Des Bauxites, supra,* 456 U.S. 694.) They have done so, both by submitting answers to interrogatories and by filing bankruptcy claims based upon their interests in the judgment; and they would

file any further document reqquired of them to affirm the jurisdiction of the California court. If this Court were to hold that the defendant can assert the jurisdictional defense, or for that matter any of the issues presented by this Petition, after trial on the merits and an adverse determination, thereby vitiating the judgment, it is *that* result which would deny due process to the members of the plaintiff class. This case presents a stark illustration of the consequences of such post-trial procedures. This case has been in litigation for ten years; Grynbergs delayed trial for almost five years, and then delayed an appellate hearing for four years by virtue of their bankruptcy proceedings. Two of the original representative plaintiffs have died; members of the class have also died during the course of these judicial proceedings. Even as to the surviving class members, the facts have grown stale and witnesses unavailable. It is for this very reason that such objections are required to be made in the trial court, so that the opposing party is at least afforded the opportunity to meet and cure the objection during the course of the trial proceedings. Failure to timely raise the objection constitutes a waiver.

Objections to personal jurisdiction may be waived, or a defendant may be estopped from asserting the issue. (*Insurance Corp. v. Compagnie Des Bauxites, supra,* 456 U.S. at pp. 704-705.) Grynbergs, by failing to raise the issue prior to judgment, have waived the issue and are estopped to assert it. The issue in this action is that simple, Grynbergs' argument notwithstanding. As this Court stated in *Insurance Corp. v. Compagnie Des Bauxites, supra*:

> "In our view, petitioners are attempting to create a logical conundrum out of a fairly straightforward matter." (*Id.* at p. 696.)

Moreover, California was not a nominal forum with regard to the trial of this action. This is not a situation where only 1/28 of the class members were residents of the forum state. Thirty-two percent of the members of the class were California residents. No other state was as involved with this action as was California in terms of the number of residents who became investors in GGRB; defendants apparently spent more time and energy soliciting in California than in any other state. The next largest group of residents from a single state was only six people. Unless this Court were to hold that a state court may not adjudicate the claims of non-residents in a class action under any circumstances, California was the most reasonable forum for the trial of this action;[8] it was selected because of the substantial number of California residents included in the class.

It should also be noted that the appellate decision in this action is not in conflict with the decision of any other court, since the Court of Appeal denied the motion to dismiss without opinion and did not further consider the issue when it rendered its opinion on the merits. (See Ap. pp. A2-17.)

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8 Despite the size of the claims of many of the class members, the cost of maintaining the action was such that no single class member, even those with the largest interests, could have afforded to maintain it; it is doubtful that the residents of any one state, other than possibly California, could have maintained it. The post-trial declarations filed with the trial court established that the out-of-pocket non-taxable litigation costs, independent of attorneys' fees, exceeded $100,000. Most of the class members could not have proceeded to assert their claims other than through an action which encompassed all of the limited partners, a fact established by both their participation in the action and their ratification of the judgment.

B.

The Individual Class Members Voluntarily Acceded To The Jurisdiction of the California Courts

Each of the members of the class responded, individually, to interrogatories dealing with various issues in the action prior to trial; each member of the class filed verified answers. Filing answers to interrogatories is deemed to be a general appearance under California law (*Chitwood v. County of Los Angeles* (1971) 14 Cal.App.3d 522, 527, 92 Cal.Rptr. 441), and thus submission to the jurisdiction of the state's courts. A state may reasonably determine the nature of the acts which are sufficient to subject a party to the power of its courts. (*Chicago Life Ins. Co. v. Cherry* (1917) 244 U.S. 25, 29-30.)

> "An appearance may arise by implication from [a party] seeking, taking or agreeing to some steps or proceedings in the cause beneficial to himself or detrimental to [the adverse party]." (*Heleasco Seventeen, Inc. v. Drake* (D.Del. 1984) 102 F.R.D. 909, 912, citing 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2686 (1973).)

As Mr. Miller stated in his argument before this Court in *Phillips Petroleum Co. v. Shutts*:

> ". . . the constitution requires that there be an affirmative act taken by the non-resident to show a willingness to subject himself to the forum." (O.T. p. 6, 11. 11-13.)

Submission of specific, verified answers to interrogatories is an unequivocal affirmative act which shows not only a "willingness" to subject oneself to the jurisdiction of the forum, but an affirmative intent to participate in, and be bound by, the action. The members of the *Danzig* class

each *appeared* in this action; there is thus no jurisdictional issue to be raised.

Moreover, each of the members of the class appeared generally in actions initiated by Grynbergs in the State of Colorado against all members of the class, individually, after the class action was filed in California for the purpose of precluding the California action. The class members asserted the priority of the California action in those Colorado actions and requested that the actions be stayed pending judgment in the California action.[9] The indi-

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[9] Grynbergs named and served all of the limited partners in actions which were filed against all of the class members subsequent to the filing of the complaint in the instant action. (Third party complaint in *Viersen & Cochran Drilling Company v. Jack J. Grynberg, et al.*, U.S. District Court for the District of Colorado, Action No. 77-C-161, in which all of the class members appeared individually; and in *A.J. Carter, et al. v. Jack Grynberg, et al.*, State of Colorado, County of Rio Blanco, Action No. C-2117 which was stayed.) Grynbergs also named the representative plaintiffs in this action as defendants *individually and on behalf of all of the limited partners* in a series of actions which Grynbergs filed in Wyoming and Colorado, all of which were eventually stayed pending resolution of the instant action; Grynbergs did not suggest in any of those actions that service upon the class representatives did not join and bind all of the members of the class. (See, e.g., *Jack Grynberg and Associates, Jack Grynberg and Celeste Grynberg vs. Paul Danzig, et al.*: (1) State of Wyoming, District Court of Sweetwater County, Third Judicial District, Action No. 2195; (2) State of Wyoming, District Court of Sublette County, Ninth Judicial District, Action No. 2688; (3) State of Wyoming, District Court of Lincoln County, Third Judicial District, Action No. 5402; (4) State of Wyoming, District Court of Uinta County, Third Judicial District, Action No. 69-1059; (5) State of Wyoming, District Court of Fremont County, Ninth Judicial District, Action No. 18715; (6) State of Wyoming, District Court of Carbon County, Second Judicial District, Action No. 77-C-455; and (7) State of Colorado, District Court of Moffat County, Fourteenth Judicial District, Action No. 3610.)

vidual members of the class thus took every action required of them, and availed themselves of every opportunity presented, to assert their intent to be bound by the California courts *prior* to the entry of judgment in this action.

C.

Each Of The Members Of The Class Acknowledged And Ratified The Judgment

Each member of the class received notice of the judgment. No class member objected to being bound by the judgment or to the judgment itself; no class member objected to rescission of his or her interest in the partnership. Each member of the class received notice of the motion of class counsel for an award of fees, and of the right of each class member to object or to be heard on that motion. No class member objected.[10]

Each of the class members filed individual, verified claims in the Chapter XI bankruptcy proceedings of both Jack and Celeste Grynberg[11] based upon his or her interest in the judgment prior to the date upon which Grynbergs first raised the jurisdictional issue. Filing of those claims affirmed the intention of each of the class members to be bound by the judgment. (See, *e.g.* Restatement Second, Conflict of Laws, §32, and comment "d" thereto.)

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[10] One non-resident class member contacted the trial judge to be certain that the award of fees would be *pro rata* upon collection.

[11] *In re Jack Grynberg [Debtor]*, Action No. 81B00821M, Bankruptcy Court for the District of Colorado; and *In re Celeste Grynberg [Debtor]*, Action No. 81B00825M, Bankruptcy Court for the District of Colorado.

Each member of the class thus acknow'edged and ratified the judgment, thereby confirming the jurisdiction of the California courts.

III.

GRYNBERGS WAIVED ANY CLAIM THAT THE LAW OF THE STATE OF RESIDENCE OF CLASS MEMBERS CONTROLLED THEIR CLAIMS

The Court of Appeal held that Grynbergs waived any claim that the law of the states of residence of the class members was applicable to their respective claims by failing to assert such claim before proceeding to trial and judgment.

California applies the "governmental interests" test to choice of law issues; the court must first determine whether there is a true conflict between the law of California and that of another state whose law is contended to be applicable and, if there be such conflict, determine the relative interests of the contending states. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 522 P.2d 666, 114 Cal.Rptr. 97.) Under California law, a claim that the law of a state other than the forum should apply to the issues must be raised *timely* so that the issue may be resolved by the trial court prior to submission of the issues to be tried. (*Hurtado v. Superior Court, supra; cf. Estate of Patterson* (1980) 108 Cal.App.3d 197, 207, 166 Cal.Rptr. 435.)

Grynbergs did not raise the claim that the law of the states of residence of the class members should apply to their respective claims in a timely manner before the trial court. They did not raise the claim at any time prior to

entry of judgment against them, although they *did* contend that the law of Colorado was the applicable choice of law; that contention was briefed by the parties. The claim that the law of the plaintiffs' residences was the applicable choice of law was not made until Grynbergs filed their motions for new trial. The contention was thus waived. Most federal circuits hold, as does California, that choice of law issues must be raised prior to trial or are waived. (See, *e.g., Michael-Regan Co., Inc. v. Lindell* (9th Cir. 1975) 527 F.2d 653, 656; *Pellerin Laundry Machinery Sales Company v. Reed* (8th Cir. 1962) 300 F.2d 305, 309-310; *Prudential Ins. Co. of America v. Carlson* (10th Cir. 1942) 126 F.2d 607, 611-612.)

No other procedural rule is practical. The trial judge must be given the opportunity to determine the facts under the law which the parties contend to be applicable. A party cannot be permitted to proceed through trial and to judgment arguing the law of one state and then, if he loses, urge for the first time that other laws or standards of proof should have been applied. Thus, for instance, even if, *arguendo,* Grynbergs' contention that the law of residence of the class members was applicable were correct, and even if, *arguenda,* certain of those states impose stricter standards of proof in fraud actions than does California, it is reasonable to assume that since an experienced and competent trial judge (to whom all parties stipulated under a procedure then in effect in Alameda County for complex cases) found sufficient evidence of intentional fraud to award punitive damages, he would have found sufficient evidence to meet the standard of proof of any state. But that argument should not be addressed to an appellate court; it must be made to the trial court which

is charged with the responsibility of weighing the evidence.[12] This case was decided on disputed facts with regard to the issues of misrepresentation, reliance, and justifiability of reliance, among others. The trial court weighed the evidence and determined the credibility of the witnesses. That court must be presented with the law and the standards of proof upon which the evidence is to be judged and weighed, if they differ from the law of the forum, *before* those decisions are made.[13]

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[12] Grynbergs attempt to argue the facts to suggest that the trial court erred in finding fraudulent misrepresentations and nondisclosures. However, they once again set forth only *their* version of the facts, which was rejected by the trial court in favor of the substantial evidence of fraud established by the plaintiff class.

[13] It should be noted, parenthetically, that the securities law of the respective states are irrelevant to this action. This action was not brought under the corporate securities act; it was tried in common law fraud. The issue of the effect of the failure to read the final prospectus is one of fact; in *Danzig*, the court found that Grynbergs deliberately sent misleading summaries to the purchasers with the final prospectuses, which the court found to be ambiguous, with the intention that the purchasers rely on the summaries. (See Decision of Court of Appeal, ftnt. 7, p. A10.) Similarly, it is inaccurate to suggest that the measure of damages would have differed under the law of any other state. No state court decision is cited for the proposition that any tax benefits received by the defrauded investor should be offset against the damages to which he is entitled; the law is to the contrary. (See, *e.g., Cereal By-Products Company v. Hall* (1958 Ill. App.) 147 N.E.2d 383.) This Court has expressly held, as has California, that a defendant should not be given a windfall by deducting any tax benefits received by the plaintiff from the award (*Hanover Shoe v. United States Machinery Corp.* (1968) 392 U.S. 481, 503); such an offset sanctions fraud, encourages fraudulent schemes which encompass tax implications and results in the government, rather than the defendant, bearing the cost of the defendant's fraud. (See, *e.g., Western Federal Corp. v. Erickson* (9th Cir. 1984) 739

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State courts are frequently called upon to apply the law of other jurisdictions. If the issue had been timely raised before the trial court, and if it was appropriate, subclasses of plaintiffs could have been established. But that opportunity must be afforded to the trial court.

It was not the plaintiff class which chose the law to be applied in this action. *Grynbergs* did so by failing to raise any issue as to the applicability of any law other than that of the forum until after judgment was entered against them. They therefore waived any claim that any other law was applicable to the claim of any class member.

IV.

GRYNBERGS WAIVED ANY CLAIM OF DEFICIENCY OF THE CLASS NOTICE

The Court of Appeal held that Grynbergs waived any objection to the form or content of the notice sent to the class by proceeding to trial and judgment on the merits without asserting any such objection.

Even were it to be found, *arguendo*, that the class did not receive adequate notice of the cause of action for rescission of the partnership agreement, Grynbergs waived

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F.2d 1439, 1444; *Burgess v. Premier Corp.* (9th Cir. 1984) 727 F.2d 826, 837-838; *G & R Corp. v. American Security & Trust Co.* (D.C. Cir. 1975) 523 F.2d 1164.) *Austin v. Loftsgaarden* (8th Cir. 1982) 675 F.2d 168, cited by Grynbergs, involved interpretation of the specific measure of damages provided by the Federal Securities Act; the 8th Circuit is in the minority even on that issue, but its holding is irrelevant to the measure of damages applied by any state court to a fraud action. *Salcer v. Envicon Equities Corp.* (2nd Cir. 1984) 744 F.2d 935, also cited by Grynbergs, specifically distinguished a judgment for rescission, which is the basis of the judgment in this action.

that deficiency by failing to object to the notice before trial, and failing to object to proceeding to trial upon the original notice. Grynbergs first raised the claim that a new notice should have been sent to the class upon amendment to the complaint *after* judgment; the contention was raised in their motions for new trial.[14] No such contention was raised prior to trial or prior to issuance of the court's tentative decision.

California precludes a defendant from first objecting to alleged deficiencies in pre-trial class certification or the pre-trial notice sent to class members after proceeding to trial on the merits without objection. Any such objection must be raised prior to trial or is deemed to be waived. (*Green v. Obledo* (1981) 29 Cal.3d 126, 147-148, 624 P.2d 256, 172 Cal.Rptr. 203; *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 371-374, 584 P.2d 497, 149 Cal.Rptr. 360.)

> "Without the requirement that class issues be resolved prior to a decision on the merits, a defendant could take advantage of decertification by a strategy similar to that of 'one-way intervention.' Thus he could appear to acquiesce in the plaintiff's motion to certify the class, holding back his evidence and his arguments on the issue. . . . [I]f . . . he loses on the merits, he can undo most of the damage by bringing out his evidence and arguments and mounting a belated attack on the certification order." (*Green v. Obledo, supra,* 29 Cal.3d at p. 147.)

That is exactly the strategy that Grynbergs attempted in this case after they lost on the merits. They raised no

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[14] See footnote 5, *supra*. Grynbergs first argued that the action had not been properly certified in their objections to the proposed findings of fact, submitted after the court had issued its memorandum of decision.

objection either to the pre-existing class certification or to the original notice which had been sent to the class members after the amendment to the complaint was permitted. The only defense to the class action asserted in their answer to the amendment was that there were not common misrepresentations to the class members.[15] The action was tried as a class action; Grynbergs introduced evidence regarding the investments of unnamed class members in an attempt, among other things, to establish lack of reliance by the class upon the representations that had been made. It was only after Grynbergs lost on the merits that they argued for the first time that the pre-trial notice had been insufficient; and they thus urge that this alleged pre-trial defect vitiated the trial and the judgment entered in favor of the class.

California does not bind a defendant to pre-trial certification if the evidence at trial fails to sustain the requisite elements for class adjudication; a motion to decertify after trial will lie on that ground. (*Grogan-Beall v. Ferdinand Roten Galleries, Inc.* (1982) 133 Cal.App. 3d 969, 977-978, 184 Cal.Rptr. 411.) That is *not* the issue which Grynbergs raise before this Court, since the trial court found that the evidence established the requisite elements for class adjudication and the Court of Appeal affirmed those findings. Rather, Grynbergs contend that after proceeding to trial without objection to the pre-trial notice, they may, after trial on the merits, contend for the first time that the *pre-trial* notice was inadequate and thereby obtain retrial on the merits. No authority

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[15] The trial court found to the contrary. (F.F. Nos. 25-28; Ap. p. A25.)

supports that contention; due process does not permit a party to sit mute to the prejudice of the other. Due process rights are waived if they are not asserted timely. (*Insurance Corp. v. Compagnie Des Bauxites, supra,* 456 U.S. 694; *Civil Service Employees Ins. Co. v. Superior Court, supra,* 22 Cal.3d at p. 373.) Objections to pre-trial procedures, which could be cured if timely raised, cannot be raised for the first time after trial on the merits.

The federal courts also hold that objections to pre-trial class certification proceedings may not be raised for the first time after trial. (See, *e.g., Newman v. Prior* (4th Cir. 1975) 518 F.2d 97, 100-101; *Kelley v. Metropolitan Cty. Bd. of Ed. of Nashville, Tenn.* (6th Cir. 1972) 463 F.2d 732, 743.)

A defendant has a bona fide interest in proper pre-trial certification of the class and notice to its members so that if he prevails, all members of the class will be bound; and he has a commensurate duty to assert that interest by pre-trial objection. Once the action has been tried and the class prevails, the defendant has no standing to contend that the class members were denied due process by the form of the notice they received; only the members of the class have proper standing at that point in the proceedings to complain that they did not receive adequate notice. Grynbergs cannot reasonably be heard to contend that the members of the plaintiff class were denied their due process rights because they were not adequately notified of the amendment, or were not given the right to choose a different measure of damages (assuming, *arguendo,* one were available), and should therefore be denied the benefit of a judgment in their favor which *they* wish to adopt. No member of the class has

complained of lack of notice; to the contrary, every member of the class has expressly adopted and ratified the judgment. It would be a patent denial of due process to the members of the class to now deny them the benefits of their judgment. It may be appropriate to permit a third party to assert the due process rights of those who cannot assert them, but that concept cannot be distorted to permit the losing party to attempt to defeat the rights of the prevailing parties which *they* seek to affirm by contending *they* were denied due process in obtaining their judgment interests.

Moreover, the members of the class did receive adequate notice. The amendment to the complaint was based upon the same facts, transactions and legal theories as alleged in the original complaint; it merely sought alternative forms of relief. No authority requires that new notice be sent every time an amendment is made to the pleadings once a class has been certified. *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.* (D.N.J. 1974) 64 F.R.D. 159, *aff'd.*, (3rd Cir. 1976) 530 F.2d 508, *cert. denied* 429 U.S. 828 (1976) and *Matarazzo v. Friendly Ice Cream Corp.* (E.D.N.Y. 1976) 70 F.R.D. 556, cited by Grynbergs, do not so hold. In *Zenith*, the defendant timely requested decertification prior to trial when the plaintiff amended the complaint; the amendment alleged new facts and entirely different causes of action. In *Matarazzo,* the objection to existing certification was also raised prior to trial; the amendment changed the status, and the potential burdens, of the class members.

Grynbergs raised no such objection prior to trial. They were at all times fully apprised of the identity of the class members and the amount of their respective

claims; indeed, Grynbergs had received answers to interrogatories from each of the class members prior to trial. After trial they cannot deny the members of the class the benefit of their judgment on the ground that the class members, who seek to accept the benefits of the judgment, did not have adequate notice of the amendment to the complaint.

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CONCLUSION

Grynbergs establish no ground upon which this Petition should be granted. Each of the issues raised before this Court was waived by Grynbergs' failure to assert such issue timely before the trial court.

Each of the contentions raised by Grynbergs in their Petition suffers from the same legal impairment: A defendant may not proceed to judgment without objecting to or asserting a claimed error which could be cured prior to trial, and then contend after trial and adverse judgment that the error, if any there be, can no longer be cured so that the defendant is entitled to a second trial on the merits. The judicial system could not function in that manner. An error which can be cured must be raised timely, or it is waived. Each of the alleged errors raised in Grynbergs' Petition, if valid, could have been cured before trial; each was therefore waived.

This case is not similar to *Phillips Petroleum Co. v. Shutts.* In *Phillips,* the issue of jurisdiction of the state court over the non-resident class members was timely litigated in the trial court; in direct contrast, the issue

was first raised in this case before the appellate court after all appellate briefs had been filed. Moreover, each class member appeared before the trial court by filing verified answers to interrogatories and thus acknowledged the jurisdiction of the trial court; and each class member ratified the judgment by filing a verified proof of claim based on his or her interest in the judgment in the Bankruptcy Court.

Grynbergs failed to timely raise the contention that the law of the states of residence of the class members should have been applied to their respective claims, and therefore waived the contention even if it were meritorious. Such contention must be raised timely to permit the parties to respond and, if appropriate, to argue the disputed facts pursuant to the law which the trial court determines to be applicable at the time of trial.

Grynbergs also waived any claim that the notice sent to the members of the class was not adequate. They proceeded through trial and to judgment without objection to the original certification and the original notice sent to all members of the class. The defendant cannot object to the form of pre-trial notification to the class after judgment has been rendered in favor of the class; a defendant cannot reasonably contend that the members of the class have been denied due process in obtaining a judgment which each class member has ratified and seeks to affirm.

The decision of the California Court of Appeal in this action did not create lack of uniformity of decision. The Court of Appeal denied the motion to dismiss the action as to the non-resident class members without opinion. The Court's decision that the claims of inadequate notice and

improper choice of law had been waived, since neither claim was timely raised in the trial court, is in conformity with long-standing California, as well as federal, law.

Grynbergs' Petition for a Writ of Certiorari should therefore be denied.

June 13, 1985

Respectfully submitted,

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No. 84-1784

In the Supreme Court of the United States

October Term, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, and CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, and CARL ZWERNER,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

Petitioners Jack Grynberg, Jack Grynberg and Associates and Celeste Grynberg (collectively the "Grynbergs") reply as follows to Respondents' "Opposition to Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District" (the "Opposition").[1]

I. CALIFORNIA DID NOT AFFORD THE DUE PROCESS PROTECTION TO ABSENT PLAINTIFF CLASS MEMBERS WHICH THIS COURT MANDATED IN *PHILLIPS PETROLEUM CO.* v. *SHUTTS.*

In *Phillips Petroleum Co.* v. *Shutts*, ___ U.S. ___, 105 S.Ct. 2965, 2971-72 (1985), this Court declared that a defendant in a multistate class action seeking a money judgment has standing to challenge the forum state's jurisdiction over absent class members because the defendant would be obviously and immediately injured if the class-action judgment became final without also binding the plaintiff class. Like Phillips Petroleum Company, the Grynbergs raised and have standing to raise class notice and related due process issues in this Court.

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1. Terms defined in the Petition, *e.g.*, the "1979 Rescission Claim," are used in this Reply without change in meaning.

In the words of the Court of Appeal, this case involves a "failure to provide notice to the class of an amendment to the complaint seeking the different *remedy* of rescission [emphasis in original]." Petition, page A8, n. 5. California's failure to afford absent *Danzig* class members an opportunity to opt out of class prosecution of the claim asserted by that amendment is beyond cavil. The Opposition raises important questions as to whether the constitutional conditions precedent to state-court jurisdiction in multistate class actions may be avoided, to the detriment of absent class members and class-action defendants, by invoking state doctrines requiring such defendants to assure compliance with jurisdictional due process prerequisites or permitting such defendants to waive fundamental rights of the absent class members which this Court recognized in *Phillips*.[2]

In *Phillips*, this Court held that state jurisdiction over claims of absent class-action plaintiffs is, under the Fourteenth Amendment, dependent upon the forum state's furnishing procedural due process protection to the absent plaintiffs. Such protection requires that (1) absent plaintiffs receive the best practicable notice of pendency of the action, which "should describe the action and the plaintiffs' rights in it" and afford them an opportunity to present their objections; and (2) each absent plaintiff be accorded an opportunity "to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 105 S.Ct. at 2975.

Under the standards of *Phillips*, the absent *Danzig* class members were denied due process. The trial court below entered its class-action judgment upon the 1979 Rescission Claim *without any notice* to absent class members of that

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2. This Court decided *Phillips* on June 26, 1985, after the filing of the Petition and the Opposition on May 14 and June 13, 1985, respectively. In light of *Phillips*, the Grynbergs no longer argue that state-court jurisdiction over absent class members is subject to a minimum contacts requirement.

claim until *after* the judgment.[3] The 1979 Rescission Claim sought rescission of the *original* GGRB partnership agreement *ab initio;* claims described in the 1976 notice sought to affirm and enforce that agreement. In contrast to the "fully descriptive" notice in *Phillips, see* 105 S.Ct. at 2969 and 2976, the 1976 notice in *Danzig* does not even mention the relief sought by the 1979 Rescission Claim. The 1976 notice gives absent class members notice only of other claims, upon which no judgment was entered. *See* Petition, pages A47 and A52. Moreover, absent class members were afforded *no* opportunity to opt out of class treatment of the 1979 Rescission Claim. The 1976 notice expressly denies an opportunity to opt out of class prosecution of all but two of the original claims, neither of which is here relevant.

Assuming *arguendo* complete adequacy of the 1976 notice with respect to all claims theretofore asserted, on no conceivable basis did the 1976 notice provide, consistently with *Phillips*, procedural due process protection to absent class members in respect to the 1979 Rescission Claim.

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3. The Court of Appeal expressly addresses "the failure to provide notice to the class of the amendment seeking the different *remedy* of rescission [emphasis in original]" but casually concludes that this failure involved "no prejudice to Grynberg" and that any error "was clearly harmless." Petition, p. A8, n. 5. The Court of Appeal's explanation is that, since the "plaintiff class received adequate notice of the original complaint alleging the same ultimate factual averments underlying the rescission theory of relief, separate lawsuits by individual members could not be successfully maintained." *Id.* The 1976 class notice (*see* Petition, pp. A47-A49) does not give notice of either facts tending to show or any claim of fraud in the inducement of the original GGRB partnership agreement. The notice explicitly delineates possible judgments based on an affirmation of the agreement which would bind the class; the only reference in the notice to rescission is expressly limited to rescission of an *amendment* two years after the original agreement. *Id.* at pp. A49-50. The Court of Appeal's conclusion that "separate lawsuits by individual class members could not be successfully maintained" is simply contrary to the clear teaching of *Phillips* that, without providing absent plaintiff class members with notice and an opportunity to be excluded, any judgment in favor of such absent plaintiffs is not entitled to *res judicata* effect. *Phillips, supra*, 105 S.Ct. at 2971-72.

II. CONSISTENTLY WITH *PHILLIPS*, THE GRYNBERGS COULD NOT AND DID NOT WAIVE DUE PROCESS RIGHTS OF ABSENT *DANZIG* CLASS MEMBERS.

The Opposition's contention (*see* pages 9-10, 19-21) that the Grynbergs waived the absence of any notice of the 1979 Rescission Claim, by failing timely to raise an appropriate notice issue, assumes that the Grynbergs had legal power to waive rights personal to absent class members. As Respondents concede (Opposition at pages 10, 22-23), the pertinent fundamental rights are due process rights of the absent class members, not of the Grynbergs. Any contention that the Grynbergs waived rights of the absent *Danzig* class members is unsupported by the record or any precedent.[4] Absent actual authority, one person cannot waive fundamental constitutional rights of another.

As this Court stated in *Phillips*, jurisdiction over absent plaintiffs is not like personal jurisdiction over a defendant, which may be forever waived by a defendant who raises no

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4. The California waiver cases relied upon by Respondents, cited at page 20 of the Opposition, are readily distinguishable. *Green* v. *Obledo*, 29 Cal.3d 126, 172 Cal. Rptr. 206, 624 P.2d 256 (1981), raised no issue of absence of jurisdiction over absent class members for lack of due process under the Fourteenth Amendment and instead involved propriety of a decertification order after a decision on the merits. *Civil Service Employees Ins. Co.* v. *Superior Court of San Francisco*, 22 Cal.3d 362, 149 Cal. Rptr. 360, 584 P.2d 497 (1978), involved waiver of a constitutional challenge to a partial summary judgment order rejecting affirmative *defenses*, which a class-action defendant opposed unsuccessfully on the merits prior to notice to absent class members of pendency of the class action. Rejecting defenses of a class-action defendant without notice to absent class members lacks jurisdictional significance, for rights of the absent members are not impaired by the rejection and, if anything, are enhanced. Imposing waiver requirements upon class-action defendants before the forum has attempted to exercise jurisdiction over absent class members in no way impairs rights of prospective absent plaintiffs. To the extent, if any, that *Civil Service Employees Ins. Co.* v. *Superior Court* or other California authority permit a class-action defendant to waive due process rights of absent class members, such decisions are contrary to *Phillips*.

objection. 105 S.Ct. at 2974-75. *Cf. Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). Jurisdiction over absent class members does not require *any* action by either absent plaintiffs or a class-action defendant; it rather presupposes that the forum state has afforded procedural due process to the absent plaintiffs. *See* 105 S.Ct. at 2974.

The Opposition implies (*see* pages 9-10) that the Grynbergs, not Respondents as class representatives, had responsibility to assure that absent class members received adequate notice and a meaningful opportunity to opt out of class treatment of the 1979 Rescission Claim. A class-action defendant should not be required to assume the fiduciary responsibilities of plaintiff class representatives. As this Court noted in *Phillips*, a class-action plaintiff need not fend for himself; "*the court and named plaintiffs protect his interests* [emphasis added]".[5] Consistently with *Phillips*, California may not invoke waiver principles to shift Respondents' responsibilities as class representatives to the Grynbergs, the class-action defendants. The conceded failure of the California courts to afford adequate notice or meaningful opportunity to opt out of class prosecution of the 1979 Rescission Claim should be reviewed by this Court.

III. RESPONDENTS' CONTENTIONS THAT ABSENT CLASS MEMBERS CONSENTED TO OR RATIFIED JURISDICTION OF THE CALIFORNIA COURTS PRESENT ISSUES FOR REVIEW BY THIS COURT IN LIGHT OF *PHILLIPS*.

Respondents contend (Opposition, pages 13-15) that absent class members voluntarily acceded to the jurisdiction of the California courts by answering certain interrogatories,

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5. 105 S.Ct. at 2974. This Court consistently has placed responsibility for proper class certification or recertification and notice upon class representatives. *See e.g., East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

which were limited to definition of unnamed class members, certain reliance issues and dilution of partnership interests. *See Danzig* v. *Superior Court for Alameda County*, 87 Cal. App.3d 604, 607, 151 Cal. Rptr. 185, 187 (1978). Neither the interrogatories nor the answers thereto are in the record on appeal; the Court of Appeal considered neither upon the appeal from the trial court's judgment. Respondents fail to disclose that those interrogatories, answers to which were *compelled* by order of the trial court, were propounded and answered in respect to the original 1975 complaint, *not* the 1979 Rescission Claim. Respondents also fail to disclose that, upon the prior appeal, the Court of Appeal, recognizing that unnamed class members may be simply "persons" and not "parties," expressly refused to hold "that unnamed class members stand on the same footing as named parties to whom interrogatories have been propounded." *Danzig* v. *Superior Court for Alameda County, supra*, 87 Cal. App.3d at 610-12, 151 Cal. Rptr. at 189-90. Such limited discovery procedures provided neither notice of the 1979 Rescission Claim nor the opportunity to be excluded from its class prosecution, the constitutional predicates, under *Phillips*, to state-court jurisdiction over absent plaintiff class members. *Phillips, supra*, 105 S.Ct. at 2975.

Respondents belatedly assert that, under California law, each absent class member who answered interrogatories made a general appearance. Opposition, page 13.[6] Any contention that these absent plaintiffs became parties is absolutely belied by the trial court's continuous treatment of this action as a class action, the trial court's class-action findings

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6. Both *Chitwood* v. *County of Los Angeles*, 14 Cal. App. 3d 522, 92 Cal.Rptr. 441 (1971) and *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1917), cited in the Opposition (p. 13) in support of Respondents' general appearance argument, establish standards for voluntary submission to state-court jurisdiction by a defendant, not by an absent class-action plaintiff. As this Court held in *Phillips*, standards governing state-court jurisdiction over a defendant do not equally apply to a state's assertion of jurisdiction over absent plaintiffs. *Phillips, supra*, 105 S.Ct. at 2974-75.

and judgment and their affirmance by the Court of Appeal.[7] Indeed, the Opposition repeatedly refers to the plaintiff *class* and advises this Court that "[t]he action was tried as a class action." Opposition, page 21.

The alleged post-judgment ratification of the class-action judgment by absent class members, which is suggested by Respondents on the basis of numerous non-record and post-judgment facts (*see* Opposition, pages 15-16),[8] does not cure constitutional defects; it instead constitutes an unfair "one-way intervention." *See American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 547 (1974). Absent class members are free at any time to disavow the alleged ratification, for which there is no consideration. Unilateral acts of a party, like the alleged ratification, do not confer jurisdiction otherwise absent. *See Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

IV. THE ACROSS-THE-BOARD APPLICATION OF CALIFORNIA LAW TO CLAIMS AND DEFENSES WITH WHICH CALIFORNIA HAS NO CONNECTION IS REVIEWABLE BY THIS COURT.

The Petition points out significant differences among California's law and the laws of other states having substantial interests and contacts affiliating them with non-California *Danzig* class members, their claims and defenses thereto.

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7. After the interrogatories had been answered, the trial court expressly found that "[t]he within action is a proper class action on behalf of the plaintiffs; the plaintiff class constitutes a proper and appropriate class." Petition, p. A36. The Court of Appeal later referred to the judgment against the Grynbergs as being "in favor of plaintiffs individually and as class representatives of all limited partner investors." Petition, p. A2.

8. Non-record facts relied upon in the Opposition include references to bankruptcy proceedings and claims filed by class members therein (*see* pp. 8, 10-11, 15, 25), without disclosure that the Court of Appeal denied Respondents' motion to supplement the record below with materials filed in such proceedings; and a failure to file an appeal bond (*see* p. 8), without disclosure that cash sufficient to discharge any proper liability of the Grynbergs to *Danzig* class members has been deposited with the Clerk of the United States Bankruptcy Court for the District of Colorado pending final allowance of disallowance of their claims.

See Petition, pages 14-16. The Opposition does not address the basic issue: can California constitutionally apply its law to every claim and defense in *Danzig* irrespective of the absence of any affiliation of California with those claims and defenses.

The Petition relies upon *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308-11 (1981), in contending that California should not be permitted in blanket fashion to apply its law to nonresidents, claims and defenses with which California has no contacts. Petition, page 14. This Court reaffirmed the *Allstate* standard in *Phillips*. 105 S.Ct. at 2980. The Opposition does not mention *Allstate* or dispute that, as to nonresident class members, California did not have contacts satisfying the *Allstate* mandate. The Opposition instead contends that the Court of Appeal "held" that the Grynbergs waived any claim "that the law of the states of residents of the class members was applicable to their respective claims by failing to assert such claim before proceeding to trial and judgment."[9] Opposition, p. 16.

Contrary to Respondents' contention, the Gynbergs adequately raised choice-of-law issues before the trial court. In their reply to Respondents' "Opening Trial Brief on Choice of Law Issue," the Grynbergs called attention to the varying standards of common law fraud and fiduciary duty among California, Colorado and Florida; noted the severe impairment of an interstate offering of limited partnership interests resulting from uniform application of California law to the

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9. Respondents' waiver contention is based principally upon *Hurtado* v. *Superior Court of Sacramento County*, 11 Cal. 3d 574, 581, 114 Cal. Rptr. 106, 110, 522 P.2d 666 (1974), holding that the forum will apply its own rule of decision unless a litigant "timely" invokes the law of a foreign state and demonstrates that "the latter rule of decision will further the interest of the foreign state and . . . is an appropriate one for the forum to apply . . . " In *Phillips*, this Court rejected as "not . . . consistent with the decisions of this Court" a substantially identical Kansas choice-of-law-standard, requiring application of forum law in the absence of a compelling reason for applying a different law, and held that the constitutional limitations laid down in *Allstate* and *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 408 (1930), "must be respected even in a nation-wide class action." 105 S.Ct. at 2981.

entire offering; and contended that any application of California law as to punitive damages should be limited to class members who were California residents because a uniform application would provide to other class members, especially the six Colorado residents, benefits to which they clearly were not entitled.[10] In objecting to the trial court's proposed findings and conclusions (prior to this Court's decision in *Allstate*), the Grynbergs specifically argued the patent unfairness of *ex post facto* application, eight years later, of California law to transactions between a Colorado offeror and, for example, a Florida offeree.

The trial court expressly addressed and decided the choice of law issues, concluding that California law should be applied to the entire action and that no other state has a strong governmental interest that would be impaired by such application. *See* Petition, page A39, Conclusions of Law Nos. 25-27. In affirming the trial court's judgment, the Court of Appeal denied on the merits, without opinion and without finding any such waiver, the Grynbergs' motion to the Court of Appeal to dismiss a portion of the *Danzig* judgment because of such and other infirmities.[11] *See* Petition, p. A18.

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10. Respondents' "Opening Trial Brief on Choice of Law Issue" admitted significant conflicts between the laws of California and Colorado with respect to the availability of punitive damages and whether the plaintiffs' affirmance of the GGRB partnership agreement precluded their subsequent rescission claim. *Compare Aaberg* v. *H. A. Harmon Co.*, 144 Colo. 579, 358 P.2d 601 (1960), *and Wheeler* v. *Wilkin*, 98 Colo. 568, 58 P.2d 1223 (1936), *with Miller* v. *National American Life Ins. Co.*, 54 Cal.App. 3d 331, 126 Cal.Rptr. 731 (1976) (availability of punitive damages); *compare Aaberg* v. *H. A. Harmon, supra, and Cole* v. *Smith*, 26 Colo. 506, 58 P. 1086 (1889), *with Williams* v. *Marshall*, 37 Cal.2d 445, 235 P.2d 372 (1951) (election of remedies).

11. The Court of Appeal's sole reference to choice of law relates, not to the Gynbergs' constitutional choice of law argument, but to their challenge to the trial court's class certification as not being founded upon common questions of law or fact. *See* Petition, page A8, n.5. The Court of Appeal did not hold that the Grynbergs waived their right to assert the constitutional infirmities of a wholesale application of California law. The Court of Appeal's premise, that "such theory is urged for the first time on appeal," is plainly incorrect. *See* text beginning at p.8, *supra*.

Since the California courts "actually considered and decided" choice-of-law issues in respect to the laws of all states here pertinent, inquiries as to when the issues were raised are irrelevant; such issues have been preserved for review by this Court. *Manhattan Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134 (1914); *accord, Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979). *See also Braniff Airways, Inc.* v. *Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 599 (1974).

Just as this Court in *Phillips* did not permit Kansas to apply its law in order to satisfy a Kansas common-question requirement, this Court should not permit California to nullify constitutional limitations on choice of law in order to satisfy California's procedural requirements. *See* 105 S.Ct. at 2980. The application of California law in this case to all claims, transactions and defenses having no relationship to California plainly disregards the constitutional limitations on choice of substantive law mandated by *Allstate* and *Phillips* and merits this Court's review.

CONCLUSION

For all reasons stated in the Petition and herein, the Grynbergs' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NO. 84-1784

In The
Supreme Court of the United States
October Term, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, and CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, and CARL ZWERNER,

Respondents.

SUPPLEMENT TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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Respondents respectfully supplement their Opposition to Petition for Writ of Certiorari (the "Opposition"), in light of this Court's recent decision in *Phillips Petroleum Co. v. Shutts,* — U.S. —, 105 S.Ct. 2965 (1985) and arguments raised in connection therewith in Petitioners' Reply to Opposition to Petition for Writ of Certiorari (the "Reply").

I.

NON-RESIDENT CLASS MEMBERS WERE PROPERLY AFFORDED DUE PROCESS PROTECTION AS MANDATED IN PHILLIPS PETROLEUM

In *Phillips Petroleum Co. v. Shutts,* — U.S. —, 105 S.Ct. 2965, 2975, this Court set forth certain minimum standards of due process protection that must be afforded absent class plaintiffs by a state which seeks to adjudicate their claims. "The plaintiff must receive notice[,] . . . an opportunity to be heard and participate in the litigation, . . . [and] an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. Finally, the Due Process Clause . . . requires that the named plaintiff at all times represent the interests of the absent class members." (*Ibid,* citing *Hansberry v. Lee,* 311 U.S. 32, 42-43)

Even if, *arguendo,* Grynbergs are not held to have waived their due process objections by failing to have timely raised said objections before the trial court, absent class members were afforded ample due process protection under the standards set forth in *Phillips Petroleum.* Notice in the form approved by the court was mailed to all members of the class[1]; each member of the class was expressly notified of the right to opt out; no member of

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[1] Grynbergs raised no objection to the form of notice.

the class elected to opt out; and each member of the class filed verified answers to interrogatories prior to trial. There is thus absolutely no basis suggested by *Phillips Petroleum* or any other authority upon which Grynbergs can complain that absent class members' interests were not adequately protected or represented by named plaintiffs.

In its rejection in *Phillips Petroleum* of petitioner's contention that the Due Process Clause requires that absent class plaintiffs affirmatively "opt in" to the class, rather than be deemed members of the class if they do not "opt out," this Court expressly noted that "[a]ny plaintiff may consent to jurisdiction. . . . The essential question, then, is how stringent the requirement for a showing of consent will be." (*Id.*, at pp. 2975-2976) This court went on to hold that the "opt out" procedure followed by Kansas was sufficient to satisfy due process and that "[r]equiring a plaintiff to affirmatively request inclusion" was unnecessary. (*Id.*, at p. 2976) Surely then, Grynbergs' argument to the contrary notwithstanding, individually verified responses to interrogatories by *every class member* is a sufficient act of consent by each class member, and establishes that each class member received adequate notice of the pendency of the action.[2]

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[2] It is ironic that Grynbergs quote language from this Court's opinion in *Phillips Petroleum* to distinguish cases cited by Respondents for the proposition that certain actions may be deemed to constitute a general appearance under California law. (Reply, p. 6, fn. 6) The basis upon which this Court held in *Philips Petroleum* that standards governing state-court jurisdiction over a defendant do not equally apply to a state's assertion of jurisdiction over absent plaintiffs is that,

> "[t]he burdens placed by a state upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." (*Id.*, at p. 2973)

(Continued on following page)

Grynbergs contend that by virtue of an amendment to the original complaint by which the plaintiff class added causes of action seeking only alternative forms of relief, absent class members' due process rights were violated. (Reply, pp. 2-3) Notably, however, Grynbergs fail to cite any authority for this novel proposition. *Phillips Petroleum* does not suggest that due process requires new notice to be sent each time representative plaintiffs determine to seek additional or alternative remedies based on the same underlying facts. Furthermore, Grynbergs fail to disclose that in permitting the amendment to plaintiffs' complaint, the law and motion judge necessarily determined that it presented no new factual or legal issues, and that the trial court expressly so found in denying Grynbergs' motion for an additional continuance of the trial date. (R.T. p. 9)[3] The California Court of Appeal also found, contrary to Grynbergs' argument, that the amendment to the complaint did *not* substantially or materially alter the nature of the original proceedings.[4]

(Continued from previous page)

Logically, therefore, this Court would presumably require even less stringent standards for voluntary submission by an absent class plaintiff than by an absent defendant. Furthermore, Grynbergs fail to cite any rationale or authority for the proposition that a defendant can voluntarily submit to a court's jurisdiction by virtue of his affirmative actions before the court whereas an absent class plaintiff cannot.

[3] The Reporter's Transcript on Appeal to the California District Court of Appeal will be cited as "R.T."

[4] Petitioners blatantly cite out of context the language of the Court of Appeal for the proposition that "this case involves a 'failure to provide notice to the class of an amendment to the complaint seeking the different remedy of rescission.'" The quotation in context reads as follows:

> "Finally, we discern no prejudice to Grynberg by reason of the failure to provide notice to the class of the amend-

(Continued on following page)

Grynbergs' entire argument is thus premised on a falacious contention.

Grynbergs argue that they could not be held to have waived their due process rights because they had no legal power to waive rights personal to absent class members. (Reply, pp. 4-5) This argument, however, begs the very issue which underlies Grynbergs' position. Adequate protection of absent plaintiff class members' due process rights is essential to defendant, and it is defendant's responsibility to ensure that such protection is afforded if any judgment ultimately obtained is to have *res judicata* effect as to such absent class members. It is on that basis that this Court determined in *Phillips Petroleum* that petitioner therein had standing to raise the issue of the adequacy of absent class members' due process rights.

> "The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment *is to ascertain that the forum court has jurisdiction over every plaintiff* whose claim it seeks to adjudicate. . ."
>
> (*Phillips Petroleum Co. v. Shutts, supra,* 105 S.Ct. at p. 2972) (Emphasis supplied)

Thus, under *Phillips Petroleum* the adequate due process protection of the absent class members is deemed

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(Continued from previous page)

ment seeking the different *remedy* of rescission. Since plaintiff class received adequate notice of the original complaint alleging the same ultimate factual averments underlying the rescission theory of relief, separate lawsuits by individual members could not be successfully maintained. In any case, since the judgment was returned in favor of plaintiff class, none of whose members earlier chose to opt out, the error—if any—in failing to provide additional notice, was clearly harmless."

(Ap. p. 8; the Appendix to Grynbergs' Petition for Writ of Certiorari will be cited as "Ap.")

a "distinct and personal interest [of defendant]" and as such, it is defendant's responsibility to ensure that such protection is afforded if he is to obtain a judgment with binding effect. (*Ibid.*) *Phillips Petroleum* does not hold that defendant may raise those issues after judgment on the merits has been rendered against him. Whatever rights defendant may assert, be they his own or be they the rights of the class members, must be asserted before the trial court, before trial and before judgment on the merits has been rendered. Grynbergs' contention that *Phillips Petroleum* suggests that "[j]urisdiction over absent class members does not require *any* action by . . . class-action defendant" (Reply p. 5) is simply without merit.

II.

PHILLIPS PETROLEUM DOES NOT OBVIATE THE REQUIREMENT THAT PETITIONERS RAISE DUE PROCESS AND CHOICE-OF-LAW ISSUES BEFORE THE TRIAL COURT

Despite all of the hyperbole contained in Grynbergs' arguments before this Court, they have failed to adequately respond to the thrust of respondents' position, *i.e.*, Grynbergs did not timely raise either the purported due process or choice-of-law issue before the trial court. In *Phillips Petroleum*, both the jurisdictional and choice-of-law issues were fully litigated before the trial court. Both issues were timely raised and considered and therefore properly preserved on appeal.

No such action was taken by Grynbergs in the instant case. Instead, they permitted the trial court to render judgment on the merits, and only then, after an adverse judgment was rendered, did they raise the issues they now raise before this Court contending that those

newly raised issues entitle them to an entirely new trial. As a result, members of the plaintiff class were precluded from responding to or taking any action to meet either issue in the trial court. No court, at either the state or federal level, has ever condoned such strategy.[5]

If there is any unfair "one-way intervention," as Grynbergs suggest, it is to permit a defendant to raise for the first time after the determination has been made that he has lost on the merits, issues which should have been litigated before trial. If such a procedural rule were to be allowed, it would be impossible for a plaintiff class to ever obtain a binding judgment, since a defendant could proceed to trial on the merits without risk and then, if he lost, raise a battery of new issues at each appellate level.

Grynbergs' assertion that the choice-of-law issues were adequately raised before the trial court is a patent misrepresentation of fact. The only choice-of-law issue raised before the trial court was in connection with Grynbergs' original position that the trial court should apply the law of *defendants'* residence, *i.e.*, Colorado.[6] Grynbergs' belated contention that the the trial court should have ap-

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[5] Grynbergs blatantly mischaracterize respondents' reliance upon *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 114 Cal.Rptr. 97, 522 P.2d 266. (Reply p. 8, fn. 9) Respondents do not argue the correctness of California's choice-of-law standard as Grynbergs intimate; that issue is not relevant to this appeal. The only issue relevant to this Petition is that California law (consistent with federal law) requires that choice-of-law objections be raised in a timely manner before trial. This Court's rejection in *Phillips Petroleum* of a Kansas choice-of-law standard was unrelated to the procedural manner or timeliness in which the choice-of-law objection was required to be raised.

[6] It is specifically to that issue only that the findings of fact and conclusions of law cited in Grynbergs' Reply are addressed.

plied the law of the jurisdiction of each class member's residence was never raised or even mentioned prior to the trial court's announcement of its decision on the merits.

III.

IN LIGHT OF THE GUIDELINES SET FORTH IN PHILLIPS PETROLEUM, APPLICATION OF CALIFORNIA LAW IS APPROPRIATE

Even if, *arguendo,* Grynbergs are not held to have waived their choice-of-law objections by failing to have timely raised said objections before the trial court, the California courts correctly applied California law as mandated by this Court in *Phillips Petroleum.* In deciding the choice-of-law issue before it in *Phillips Petroleum,* this Court adopted the standard " 'that for a state's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' " (*Phillips Petroleum Co. v. Shutts, supra,* 105 S.Ct. at pp. 2978-2979, citing *Allstate Ins. Co. v. Hague,* 499 U.S. 302, 312-313 (1981))

In applying that standard in *Phillips Petroleum,* this Court examined first, whether the law of the forum state conflicted in any material way with any other law which could have been applied;[7] and second, whether the forum state had a "significant contact or aggregation of contacts" to the claims asserted by each member of the plaintiff class. (*Id.,* at pp. 2977-2980) Only after determin-

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[7] Which said procedure is virtually identical to that followed by California courts under *Hurtado v. Superior Court, supra,* 11 Cal.3d at p. 580.

ing that the law of the forum state was in "substantive conflict" with that of other jurisdictions whose laws could have been applied,[8] and that the percentages of plaintiff class members and subject gas leases which had any connection with the forum state were miniscule,[9] did this Court find that application of Kansas law to every claim was sufficiently arbitrary and unfair as to exceed constitutional limits. (*Id.*, at p. 2980)

In the instant case there is no substantive conflict between the law applied and that of any other jurisdiction whose law could have been applied. As noted in Respondents' Opposition, the instant action was tried below in common law fraud which does not differ significantly from jurisdiction to jurisdiction; the determinative issues of reliance, causation, materiality and intent are issues of fact, not of law. (Opposition, pp. 16-19)

This Court expressly held that "[w]e must first determine whether [the law of the forum state] conflicts in any material way with any other law which could apply. There can be no injury in applying [the law of the forum state] if it is not in conflict with that of any other jurisdiction connected to this suit." (*Phillips Petroleum Co. v. Shutts, supra,* 105 S.Ct. at p. 2977) Grynbergs do not refute respondents' position that the application of common law fraud does not vary materially throughout the United States, nor respondents' contention that the trial

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[8] Under Oklahoma law, for example, liability may not have existed at all. (*Id., at p. 2980)*

[9] Less than one percent (1%) of the gas leases at issue were located in Kansas and only three per cent (3%) of all plaintiff class members resided in Kansas. (*Id.*, at p. 2977)

court's award of punitive damages and express findings of deliberate misrepresentation would be sufficient to satisfy any state's standard of proof for common law fraud. Instead, Grynbergs engage in an irrelevant discussion of the purported uniqueness of California's securities and corporate blue sky laws. Therefore, absent any showing that a substantially different result would have been obtained in any other jurisdiction in which this action could have been tried, there is no basis on which this Court can determine that Grynbergs were caused injury by application of California law.

Furthermore, California *does* have a significant contact to the claims asserted by the plaintiff class. No other state was as involved with this action as was California. The GGRB program was registered in California; thirty-two percent (32%) of the members of the class were California residents; and defendants apparently spent more time and energy soliciting in California than in any other state. Thus, in direct contrast to the situation faced by this Court in *Phillips Petroleum*, California was the *most reasonable* forum for the trial of this action; it was, in fact, selected because of the substantial number of California residents included in the class.

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CONCLUSION

Grynbergs present no issue for consideration by this Court. *Phillips Petroleum* provides no basis upon which the judgment entered in this action can be attacked. The due process requirements of *Phillips Petroleum* were satisfied. Each class member received adequate notice, did not opt out, and actively participated in the action. The amendment to the complaint merely sought a different remedy than the original complaint based on the same

facts and legal principles. The members of the plaintiff class were and are bound by the judgment. Grynbergs cannot cure their failure to timely assert objections, if any, to the form of the notice by attempting to assert a non-existent denial of rights to the class members.

Similarly, *Phillips Petroleum* does not permit choice-of-law issues to be raised for the first time by defendant after trial on the merits and after he has been adjudged the loser. If the defendant voluntarily proceeds to trial under the law of the forum (or seeks, as did Grynbergs, adjudication under the law of a state other than that of the resident class members), he cannot be permitted to then raise that choice-of-law issue after trial. Constitutional protection of the defendant's rights does not require that he be permitted to try his case once under one rule of law (even assuming, *arguendo,* there was a real conflict of law in this case) and then, if he loses, object for the first time and retry his case under some other rule of law.

A defendant must timely assert his claims and objections. If he fails to do so, he waives them. This case is that simple.

For all the reasons stated in the Opposition and herein, Grynbergs' Petition for Writ of Certiorari should be denied.

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